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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 553

JOSEPH GALLOWAY, BY FREDA GALLOWAY, HIS GUARDIAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1942.

CERTIORARI GRANTED JANUARY 4, 1943.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 19, 1943.

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[fol. 1] Names and addresses of attorneys omitted.

IN THE NORTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 1582-R

JOSEPH GALLOWAY, by FREDA GALLOWAY, His Guardian, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

[fol. 2] COMPLAINT—WAR RISK INSURANCE—Filed June 15, 1938

Plaintiff complains of the Defendant, and for cause of action alleges:

I

That plaintiff is a citizen of the United States and a resident of the Northern District and State of California, and of the City of and County of Sacramento therein.

II

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III

That on or about the 1st day of November, 1917, plaintiff entered the armed forces of the defendant; that he served the defendant as a private in its army from the said 1st day of November, 1917, to on or about the 29th day of April, 1919, when he was honorably discharged from said service.

IV

That immediately after entering the defendant's said service, plaintiff made application for and was granted insurance in the sum of $10,000.00 by the defendant, who thereafter issued to plaintiff its certificate No. T of his

compliance with said acts, so as to entitle him and his [fol. 3] beneficiaries to the benefits of said acts, and that during the term of his said service the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly when the same became due on said policy until midnight of May 31, 1919.

V

That on or about the 29th day of April, 1919, and while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as neuro-psychiatric diseases, nervous trouble, mental trouble, and other disabilities as shown by the records and files of the defendant's Veterans' Administration.

VI

That said injuries, diseases and disabilities have continuously since April 29, 1919, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since April 29, 1919, and still now is, permanently and totally disabled by reason of, and as a direct and proximate result of such disabilities above set forth.

[fol. 4]

VII

That on July 3, 1931, said plaintiff was, and for a long time prior thereto had been, incompetent and insane, and was suffering from neuro-psychiatric diseases that rendered him incompetent and insane. That plaintiff, on or about the 26th day of June, 1934, by and through Freda Galloway, his legal and general guardian, executed a claim for insurance for permanent total disability on behalf of said plaintiff, and filed the same on the 27th day of June, 1934, and made claim to the defendant through its Veterans Administration and the Administrator of Veterans Affairs thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Administration

and the Administrator thereof, refused to pay plaintiff said insurance, and on January 3, 1936, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to the same, which said disagreement exists at the present time.

VIII

That under the provisions of the said acts and other acts amendatory thereof, plaintiff is entitled to the payment of Fifty-seven and 50/100 Dollars ($57.50) for each and every month transpiring since April 29, 1919, and continuously thereafter so long as he lives and continues to be permanently and totally disabled.

[fol. 5]

IX

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance recovered in this action, payable at the rate and in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

As and for a Second Cause of Action Against the Defendant Plaintiff complains and alleges as follows:

I

Plaintiff adopts and reincorporates in this, his second cause of action, paragraphs I, II, III, IV, VII, and IX of his first cause of action, and makes them a part hereof the same as if set out in full herein.

II

That at the time plaintiff ceased to pay said premiums due on said insurance he was suffering from compensable disabilities, to wit, nervous trouble, mental trouble and neuropsychiatric disease, and other disabilities of ten per centum (10%) or more degree of disability, resulting directly from injuries and diseases contracted in line of duty while in the active service of the defendant, United States of America. [fol. 6] That in pursuance of the provisions of the War Risk Insurance Act and the World War Veterans Act of June 7,

1924, as amended, said Joseph Galloway was given various compensation ratings by the defendant's Bureau of War Risk Insurance and also by its Veterans' Bureau, namely, of a compensable degree of disability of ten per centum (10%) or more, from April 29, 1919, up to the present time, all of which ratings are of a compensable degree of disability.

III

That by reason of non-payment of premiums due on his said insurance as aforesaid, the defendant claims that said insurance lapsed on May 1, 1919; that at all times from and after the 29th day of April, 1919 up to and including July 30, 1934, through the application of compensation to which he was entitled under the disability ratings as aforesaid, and Section 305 of the War Risk Insurance Act, as amended, and which was then uncollected, Joseph Galloway's said insurance was revivable and revived in the sum of $10,000.00 as directed by said statutes under aforesaid Section 305 of the World War Veterans Act of June 7, 1924, as amended, and became payable to him in monthtly installments of Fifty-seven and 50/100 Dollars ($57.50) per month as and from the time of the beginning of his permanent and total disability, or during the remainder of his life, and after his death, thereafter to his beneficiary until a total of two hundred forty (240) of said installments have been paid, less [fol. 7] the unpaid premiums and interest thereon at five per centum (5%) per annum, compounded annually, in installments as provided by law.

IV

That ever since the 29th day of April, 1919, and at all times since that date, there has been due to plaintiff said sum of Fifty-seven and 50/100 Dollars ($57.50) for each and every month transpiring since that date, less unpaid premiums thereon and interest thereon at five per centum (5%) compounded annually in installments as provided by law, and that there will be due in the future like monthly installments in a like amount so long as plaintiff remains permanently and totally disabled. That the defendant has wrongfully and unlawfully refused to pay the plaintiff any of said monthly installments of Fifty-seven and 50/100 Dollars ($57.50) per month due plaintiff since April 29, 1919.

Wherefore Plaintiff prays judgment as follows:

First. That plaintiff since April 29, 1919, has been and still is permanently and totally disabled;

Second. That plaintiff have judgment against the defendant for all of the monthly installments of Fifty-seven and 50/100 Dollars ($57.50) per month for each and every month from the said 29th day of April, 1919, and continuously so long as he lives and remains permanently and totally disabled;

Third. That plaintiff have judgment against the defend-
[fol. 8] ant for all of the monthly installments of said insurance in the amount of Fifty-seven and 50/100 Dollars ($57.50) for each and every month beginning with the date upon which he is found to be permanently and totally disabled, to wit, any time between April 29, 1919, and July 30, 1934, during all of which time he had uncollected compensation due him from the United States Veterans Administration sufficient to have paid all premiums due on said insurance, less the unpaid permiums and interest thereon at five per centum (5%) per annum compounded annually, in installments as provided by law, and continuously thereafter so long as plaintiff remains permanently and totally disabled.

Fourth. Determining and allowing plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance recovered in this action, payable at the rate and in the manner provided by Section 500 of the World War Veterans Act of 1924, as amended, and for such other and further relief as may be just and equitable in the premises.

Alvin Gerlack, Attorney for Plaintiff.

Duly sworn to by Freda Galloway. Jurat omitted in printing.

[fol. 9] [File endorsement omitted.]

In United States District Court

Notice of Filing Complaint Against United States under Tucker Act of March 3, 1887, and the World War Veterans Act as Amended—Filed June 20, 1938

To the Honorable, the Attorney General of the United States, and to Honorable Frank J. Hennessy, United States Attorney for the Northern District of California:

[fol. 10] Sirs:

Please take notice that plaintiffs complaint in the above-entitled cause was duly filed with the Clerk of the United States District Court for the Northern District of California on the 15th day of June, 1938, which court has jurisdiction of the cause set forth in said complaint and in which district plaintiff resides.

Dated June 16th, 1938.

Alvin Gerlack, Attorney for Plaintiff.

Receipt by copy of the within Notice of Filing Complaint against the United States under the Tucker Act, together with copy of said complaint is hereby admitted this 16 day of June, 1938.

Frank J. Hennessy, United States Attorney, by Thos. C. Lynch, Assistant U. S. Attorney, Attorneys for Defendant, United States of America.

[File endorsement omitted.]

In United States District Court

Affidavit of Service on United States Attorney and Mailing Notice to Attorney General under Tucker Act and World War Veteran Act, as Amended—Filed June 20, 1938

[fol. 11] United States of America,
State of California,
City and County of San Francisco, ss:

Irving Schoenfeld, being first duly sworn, deposes and says: That he is the clerk for the attorney for plaintiff in the above entitled action. That on the 16th day of

June, 1938, he served a copy of the complaint on file herein, together with a copy of the Notice of Filing Complaint against the United States under the Tucker Act of March 3, 1887, and the World War Veterans Act as amended, on the United States Attorney for the Northern District of California, by giving to and leaving with said U. S. Attorney, true and correct copies of each of said papers.

That on the 17th day of June, 1938, he mailed to the Attorney General of the United States, Washington, D. C., full and complete copies of each of said foregoing papers, by registered mail, postage thereon fully prepaid, and deposited the same in the United States Postoffice at San Francisco, Calif., addressed as follows: "The Honorable, the Attorney General of the United States, Washington, D. C." Registered, Return receipt requested."

Irving Schoenfeld.

Subscribed and sworn to before me this 17th day of June, 1938. Thomas A. Dougherty, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[File endorsement omitted.]

[fol. 12] In United States District Court

Answer to Complaint—Filed Dec. 1, 1938

The United States of America for answer to the complaint of plaintiff herein denies each and all of the allegations thereof.

Wherefore, defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

Frank J. Hennessy, United States Attorney.

Receipt of the within Answer by copy admitted this 26th day of Nov. 1938.

Alvin Gerlack, Attorney for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed March 16, 1940

Comes Now the defendant, United States of America, by Frank J. Hennessy, United States Attorney for the Northern District of California, Thomas C. Lynch, Assistant United States Attorney, and Daniel Dillon, Attorney, Department of Justice, and files this, its Amended Answer, and in answer to plaintiff's complaint filed herein admits, denies, and alleges:

[fol. 13]

I

Answering paragraph I of the complaint, defendant, being without knowledge or information sufficient to form a belief relative to the citizenship and residence of the plaintiff, denies the allegations thereof.

II

Answering paragraph II of the complaint, defendant admits that this action is brought under the provisions of the Act of October 6, 1917, and the World War Veterans' Act of 1924, and Amendatory Acts, and is based upon a contract of insurance issued Joseph Galloway.

III

Answering paragraph III of the complaint, defendant denies allegations of said paragraph as alleged, and avers the facts to be that Joseph Galloway entered the military service of the United States on November 1, 1917, and was discharged April 29, 1919; that he subsequently enlisted in the United States Navy on January 15, 1920, and served until July 8, 1920; that he subsequently enlisted in the United States Army on December 7, 1920, and served until May 6, 1922.

IV

Answering paragraph IV of the complaint, defendant denies the allegations therein contained and avers the facts to be that while in the service of the United States Army and on, to-wit, the 1st day of February, 1918, Joseph Gallo-

[fol. 14]

way applied for and was granted a contract of war risk term insurance in the amount of $10,000; that premiums were paid thereon to include the month of April, 1919.

V

Answering paragraph V of the complaint, defendant denies each and every allegation therein contained.

VI

Answering paragraph VI of the complaint, defendant denies each and every allegation therein contained.

VII

Answering paragraph VII of the complaint, defendant denies the allegations therein contained and avers the facts to be that claim for insurance benefits on which the instant action is based was received by the Veterans Administration on June 27, 1934; that the same was denied by the Insurance Claims Council of the Veterans Administration on March 14, 1935; that an appeal from this decision was taken to the Administrator of Veterans' Affairs on September 14, 1935; that the Board of Veterans' Appeals confirmed the decision of the Insurance Claims Council on January 3, 1936.

VIII

Answering paragraph VIII of the complaint, defendant denies each and every allegation therein contained.

IX

Answering paragraph IX of the complaint, defendant is without knowledge or information sufficient to form a belief [fol. 15] upon which an answer could be based relative to the employment by the plaintiff of counsel. Defendant avers that the matter of attorneys' fees is subject to the provisions of Section 500 of the World War Veterans' Act of 1924, and Acts amendatory thereof.

Answer to Plaintiff's Second Cause of Action

I

Answering paragraph I of plaintiff's second cause of action, defendant incorporates the paragraphs in defendant's amended answer to plaintiff's first cause of action in respect to paragraph I, II, III, IV, VII, and IX, and makes hereof said paragraphs part of defendant's amended answer to plaintiff's second cause of action.

II

Answering paragraph III of plaintiff's second cause of action, defendant denies each and every allegation contained therein.

III

Answering paragraph III of plaintiff's second cause of action, defendant denies each and every allegation therein contained.

IV

Answering paragraph IV of plaintiff's second cause of action, defendant denies each and every allegation therein contained.

[fol. 16] For Further Answer And Affirmative Defense.

I

Defendant avers that plaintiff filed claim for insurance benefits under the policy herein sued upon with the defendant on June 27, 1934; that said claim was finally denied by the defendant on January 3, 1936; that suit was commenced June 15, 1938, and that accordingly this suit is barred by the statute of limitations, as set forth in Section 19 of the World War Veterans' Act, and Acts amendatory thereof.

Wherefore, the premises considered, defendant prays that plaintiff take nothing by his action and that the said cause be dismissed with costs to the defendant incurred.

Frank J. Hennessy, United States Attorney. Thomas C. Lynch, Assistant U. S. Attorney. Daniel Dillon, Attorney, Department of Justice.

Consent is hereby given to defendant to amend its original answer.

Alvin Gerlack, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 17] In United States District Court

Minute Entries of Trial

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Courtroom thereof in the City of Sacra-

mento on Wednesday, the 10th day of September, in the year of our Lord One Thousand Nine Hundred and Forty-one. Present: The Honorable Michael J. Roche, District Judge.

IN THE NORTHERN DIVISION OF THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 1582-R

JOSEPH GALLOWAY, by FREDA GALLOWAY, His Guardian, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

This case came on this day for trial. Alvin Gerlack, Esq., appearing as attorney for the Plaintiff, and Daniel Dillon, Esq., Attorney, Department of Justice, appearing as attorney for the defendant. After hearing Emmet J. Seawell, Esq., Assistant U. S. Attorney, it is Ordered that Daniel Dillon, Esq., be and he is hereby admitted to practice as an attorney for this Court only for the purpose of the trial of this case. The Court ordered that this case proceed to trial, and thereupon the following persons, viz:

Egbert B. Jackson,	E. C. LeCount,
William H. Rafferty,	Jeanette Lawrence,
Chas. M. Colton,	Fred C. Yerby,
John F. Spencer,	Irvin R. Barr,
John Ing,	Fred D. Corfee,
Wilson J. Brown,	Walter E. Seavy,

[fol. 18] twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. On motion of Mr. Dillon, it is Ordered that all witnesses in attendance be excluded from the Court-room until called to testify. On motion of Mr. Gerlack, Attorney for Plaintiff, it is Ordered that the Second Cause of Action herein be and the same is hereby dismissed. Mr. Gerlack made a statement to the Court and Jury on behalf of the Plaintiff, and Mr. Dillon made a statement to the Court and Jury on behalf of the Defendant. Mr. Gerlack introduced and read in evidence the depositions of John J. O'Neill, Walter J. Wells and Chaplain Albert K. Mathews on behalf of the Plaintiff. Ordered that the further trial

hereof be continued until Thursday, September 11, 1941, at ten o'clock a. m., and the Jury, after being duly admonished by the Court, was excused until that time.

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was thereupon resumed. Mr. Gerlack introduced and read in evidence the depositions of Comfort B. Platt and Lt. Col. James E. Matthews on behalf of the Plaintiff. John Tanikawa being first sworn testified on behalf of the Plaintiff. E. M. Wilder, M. D., was sworn and testified on behalf of the plaintiff. Mr. Gerlack offered in evidence certain Exhibits which were marked Plaintiff's Exhibits 1-A, 1-B, 1-C, 1-D, 1-E, 1-F and 1-G. Plaintiff rested. Mr. Dillon [fol. 19] offered and read in evidence the deposition of Dr. George F. Klemann on behalf of the defendant. Ordered that the further trial of this case be continued until Friday, September 12, 1941, at 9 o'clock a. m., and the jury after being duly admonished by the Court, was excused until that time.

Order Granting Motion for Directed Verdict

The parties hereto and the Jury impaneled herein being present as heretofore, the further trial of this case thereupon resumed. Mr. Dillon introduced in evidence and filed Defendant's Exhibits A, B, C, D, E, and F. The defendant rested and thereupon the evidence was closed. Mr. Dillon made a motion for a directed verdict in favor of the defendant. After argument, it is Ordered that said motion be and the same is hereby granted. Thereupon the Court instructed the Jury to return a verdict in favor of the defendant, and thereupon the jury at 10:25 o'clock a. m., retired to deliberate upon their verdict. At 10:32 o'clock a. m. the jury returned into Court and, being asked if they had agreed upon their verdict, replied in the affirmative, and returned the following verdict, which was ordered recorded, viz:

[Title omitted]

[fol. 20] VERDICT OF THE JURY

We, the jury in the above entitled cause, find in favor of the Defendant.

Dated: Sept. 12, 1941.

Jannette Lawrence, Foreman.

(Endorsed:) Filed September 12, 1941, at 10 o'clock and 32 minutes A. M. Walter B. Maling, Clerk, by J. A. Schaertzer, Clerk.

On motion of Mr. Gerlack, it is ordered that the plaintiff be allowed an exception to the ruling of the Court and to the verdict of the jury. Ordered that the judgment be entered herein in accordance with said verdict.

IN UNITED STATES DISTRICT COURT

JUDGMENT ON VERDICT— September 15, 1941

This cause having come on regularly for trial on the 10th day of September, 1941, before the Court and a jury of twelve persons, duly impaneled and sworn to try the issues joined herein; Alvin Gerlack appearing as attorney for the plaintiff and Emmit J. Seawell, Assistant United States Attorney, and Daniel Dillon, Attorney, Department of Justice, appearing as attorneys for the defendant; and the trial having been proceeded with on the 10th, 11th, and 12th days of September, in the said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed, and the Court having [fol. 21] granted defendant's motion for a directed verdict and after instruction by the Court, the jury having rendered the following verdict, which was ordered by the Court, namely:

"We, the jury in the above entitled cause, find in favor of the Defendant.

Dated: Sept. 12, 1941.

Jannette Lawrence, Foreman.

and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, Therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendant go hereof without day and that said defendant do have and recover of and from said plaintiff its costs herein expended taxed at $——.

Judgment entered this 15th day of September, 1941.

Walter B. Maling, Clerk, by F. M. Lampert, Deputy Clerk.

[fol. 22] In Northern Division of the United States District Court for the Northern District of California

No. 1582-R

Joseph Galloway, by Freda Galloway, His Guardian, Plaintiff,

vs.

United States of America, Defendant

Statement of Proceedings and Evidence

Plaintiff and appellant presents the following parts of the record, proceedings and evidence to be included in the record on appeal, to wit:

Stipulation as to Certain Facts

Mr. Gerlack: • • • Mr. Dillon, I wonder if we could save the time of the Court and jury by stipulating to certain indisputable facts? It is admitted, is it not, that the plaintiff is a resident of Sacramento?

• • • • • • •

Mr. Dillon: It is hereby stipulated between counsel for the respective sides that the insured, Joseph Galloway, while serving his first enlistment in the United States Army, filed for and was granted $10,000 war risk term insurance, [fol. 23] which lapsed for the non-payment of the premium due April 1st, 1919, and with the days of grace provided in the policy, finally lapsed as of May 31, 1919, unless at that time he was totally and permanently disabled.

Mr. Gerlack: May I make a correction? You mean the premium was paid for the month of April and lapsed for non-payment May 1st?

Mr. Dillon: No, May 31st.

Mr. Gerlack: The premium was due May 1st, but was not paid. You mentioned April 1st.

Mr. Dillon: Paid through the month of April, finally lapsed May 31st.

Mr. Gerlack: That is right.

Mr. Dillon: Further stipulated and agreed that Freda Galloway was issued Letters of Guardianship for the person and estate of Joseph Galloway in the Superior Court of the state of California in and for the County of Alameda on February 11, 1932. It is further stipulated and agreed that claim for insurance benefits on the policy herein sued upon was received by the Veterans' Administration on June 27, 1934; that the same was denied by the Insurance Claims Council of the Veterans' Administration on March 14, 1935; that an appeal was taken from this decision to the Administrator of Veterans' Affairs on September 14, 1935, and the claim was finally denied by the Board of Veterans' Appeals on January 3rd, 1936.

[fol. 24] Mr. Gerlack: We accept that stipulation.

• • • • • • •

Mr. Gerlack: We have also alleged in the second cause of action, based upon Section 305 of the Act—Counsel has shown me the official rating sheet, which would mean that the cause of action necessarily fails, so we dismiss that.

• • • • • • •

Mr. Gerlack: We dismiss the second cause of action, and we stand on one proposition, whether or not he was totally disabled when he was discharged from the Service April 29, 1919, or within the grace period of the policy, which lapsed midnight May 31, 1919.

(Opening statements were made by Mr. Gerlack and Mr. Dillon.)

The deposition of JOHN J. O'NEILL, witness on behalf of plaintiff, taken at Wilmington, Delaware, on April 19, 1941, was read into evidence on behalf of the plaintiff. Plaintiff was represented by C. L. Dawson, Esq., and Samuel M.

Gold, Esq., Attorney, Department of Justice, appeared on behalf of defendant.

Mr. O'Neill, after stating that he resided at 58 Van Griff Avenue, Pennsville, New Jersey, age fifty-three, and that he lived in Philadelphia up to about two months ago, testifieed as follows:

[fol. 25] "Direct examination.

"By Mr. Dawson:

* * * * * * *

"Q. And did you know Joseph Galloway?

"A. Yes, sir, born and raised with him.

"Q. The same Joseph Galloway that is married to Freda Galloway?

"A. Yes, sir.

"Q. Who now lives in California?

"A. Yes, sir. The last time I had seen him was in Sacramento, California.

"Q. Is this the same Joseph Galloway that you knew in Philadelphia, the same person who has now instituted a suit against the United States Government?

"A. Yes, sir.

"Q. In the District Court of the United States for the Northern District of California?

"A. Yes, sir.

"Q. Now, when did you first know Joseph Galloway?

"A. We were small kids together. I wouldn't know how long, close to fifty years ago, as long as I can remember, in other words.

"Q. And where did you know him?

"A. In Philadelphia.

"Q. And how well did you know him?

"A. Well, like I say, we played together from children [fol. 26] up and worked together, and everything. I couldn't know anybody any better.

"Q. You went to school together?

"A. I never went to school but very little. I only went to the second grade and I don't know whether we went to the same school at different times or not. Galloway would be a year or two older than me, too, you know.

"Q. Now, Mr. O'Neill, how long were you in close association with Joseph Galloway while you lived in Philadelphia?

"A. All the time previous to when he went in the army, and from when he come out of the army for seven years after he come out of the army I would say five or six years.

"Q. That is, you knew him from the time he was a small boy until five years after he got out of the service?

"A. Yes, sir.

"Q. And were you closely associated with him during all of those years?

"A. Yes, sir, sure, we were chums together all the time.

"Q. Now, Mr. O'Neill, do you recall the time when Joseph Galloway came back from the service during the period of the World War?

"A. Yes, sir.

"Q. And where did you see him?

"A. In the immediate neighborhood of Front and South, in Philadelphia.

"Q. And what did you observe about his condition, phys-
[fol. 27] ical and mental, at that time?

"A. He was a wreck compared to what he was when he went away. The fellow's mind was evidently unbalanced.

"Q. When was that, Mr. O'Neill?

"A. That would be in April or May, 1919.

"Q. Well, what kind of clothes was he wearing at that time?

"A. He was wearing a uniform and he had some kind of a decoration from the division that he was in, I think the Third Division. I am not sure about that.

"Q. Well, just tell us what you observed principally about him in April or May, 1919?

"A. Well, he would get off in a corner by himself and he would get like crying spells. Another time you would meet him and he would appear to be all right. He would talk sensible, the same as anybody else would maybe the next day or for a couple of days, and then he would go off and wander again with a lot of nonsensical talk. For instance, you would be talking to him and we would try to cheer him up, and one thing and another, and there would be a couple of fellows across the street that would do anything for him, good friends of his, and he would be talking about them, that they wanted to beat him up when they got a chance, and that kind of nonsense.

"Q. When was that?

"A. That was when he came out in 1919, I would say around April or May.

[fol. 28] "Q. Now, tell us what else you observed about him.

"A. I have seen him, I don't know how many times, he would walk over to the curb and spit blood and he would say, 'There is that f-ing gas.'

"Q. How often did you see him do that?

"A. I would say a dozen times. I have seen him do it quite often, because I never knew at that time that there would be anything like this today here.

"Q. Well, when, about, according to the best of your recollection, did that occur the first time?

"A. When he was around for a few days after coming home from the army.

"Q. Well, tell us, Mr. O'Neill, where did you live in 1919?

"A. 619 South Hancock Street.

"Q. And where did Mr. Galloway live at that time, if you know?

"A. I think at that time he was living 610 South Front Street.

"Q. How close are those two places?

"A. Oh, about two squares.

"Q. Tell us how often, according to the best of your recollection, you saw Mr. Galloway during those early days in 1919?

"A. About that I don't know, I am not positive about that, see. I know he lived there at one time, but that is as near as I can recall, but my address I am positive about.

"Q. Well, then, during 1919 he lived in the same vicinity where you did?

[fol. 29] "A. Yes, sir.

"Q. How often did you see him during 1919?

"A. Every day. I worked right in the same neighborhood for the John Baizley Iron Works, which is only about two squares from there, 514 South Delaware Avenue, Philadelphia. That firm isn't in existence. I saw him every day, and more so over the weekends of course, when I wouldn't be working and over the weekends and Sundays.

"Q. Were you chumming together in 1919?

"A. Yes, sir; we were so thick, and I thought staying around him and people talking to him would try to get him out of his mood, and evidently when he would have one

of his good days somebody had told him how he acted at times. I walked into a store he was sitting in at 604 South Front Street and he was sitting in the back room crying.

"Q. When was that, Mr. O'Neill?

"A. In the early part of 1919 after he was home a couple of months.

"Q. What was he crying about?

"A. That is what I asked him. He was sitting there crying and I said, 'What is the matter, Joe?', and he said, 'God damn it, I must be a Doctor Jekyll and Mr. Hyde.'

• • • • • • •

"A. (Continued): And in doing so they told him the crazy talk he would go through and all, and at this time he was evidently in his right mind and realization set in, [fol. 30] and he was sitting there crying like a baby. He sat there for a couple of hours crying.

"Q. Mr. O'Neill, did there come a time later when you observed other conditions than what you have testified to?

"A. There was a time some time later, I don't know how much later, it may have been a couple of years or more, that he got an idea that—do you recall that Bergdoll occasion, reputed to have gold?

"Q. You mean, Grover Bergdoll?

"A. Yes, sir, and he had the idea that Bergdoll was a friend of his and wanted to get in touch with him in reference to that.

"Q. About what?

"A. About this pot of gold that Bergdoll had told the government he had hid, or something or other.

"Q. Well, now, Mr. O'Neill, from the time that Mr. Galloway came home from the service in 1919 up to the time that you knew him some five years later, as you testified to, did this same condition that you have stated exist during all the time?

"A. No, there would be days when he would be all right and there would be other times that he would be just the other way. There would be times for three or four days a week when he would keep himself clean and carry on the conversation, and then there would be a couple of days when evidently his mind would drift and he didn't care about his appearance and he would splabber around the [fol. 31] mouth here and he didn't bother shaving or nothing.

"Q. Was he that way before the service?

"A. No, sir, he was a picture of health and neat as a pin.

"Q. I believe you testified that you knew him about five years after he came back from the service?

"A. That is my opinion. After that he drifted out West somewheres around California or out there, and I say that is about five years.

"Q. Well, he reenlisted in 1920. Did you see him during that time?

"A. Yes, I can recall around that time. I can recall around that time.

"Q. When you say that he would be all right, how long would that condition last?

"A. Maybe a couple of days, maybe a couple of months.

"Q. Do you know whether he was working in 1919 or not?

"A. I am not sure about working, but I know one time we were surprised he got in the Navy, I think in the Navy or in the Government service.

* * * * * * *

"Q. Had you worked with him prior to the service?

"A. Yes, sir, worked along shore off and on, together at that time.

"Q. What kind of a worker was he at that time?

"A. A steel boat worker.

"Q. Did you notice anything about this mental condi-[fol. 32] tion prior to the time he went into the army in 1917?

"A. No, sir, he was all right then.

"Q. Did this mental condition that you have described continue from 1919 down to the time that you last saw him?

"A. Like I say, off and on, he would go maybe a couple of days one way, and a couple of days another. Some times he would have longer periods. Some times he would go a couple of months all right.

"Q. Now, Mr. O'Neill, when he was all right, as you have testified to, would he be neat and clean and shaved?

"A. Yes, he would be his old self. He would be absolutely O. K.

"Q. Have you during your lifetime observed people who are mentally off?

"A. Yes, sir, I have visited institutions a few times.

"Q. Well, based upon your observation of Joseph Galloway in 1919 and on to the time you last saw him, would you say whether the man was competent or incompetent?

"A. I would say some times he was and some times he wasn't. That is the only way I could make that.

"Q. During the time that you observed him, during the years, the early part of the year 1919 until the time you last saw him, how long a period would you estimate that he was all right as you have suggested he would be at times?

"A. The longest, you mean?

"Q. Yes.

"A. Oh, I would say two months. That is what I would think.

[fol. 33] "By Mr. Gold:

"Q. What did you say, two months?

"A. Yes.

"By Mr. Dawson:

"Q. And how long was it usually, I mean, how long would he be all right, usually?

"A. Well, when he first got back, I can recall better he would only go a few days, one way or the other. He would go a few days, like, a little off, and then a few days at himself.

"Q. Now, have you told us about everything that you observed about his mental condition?

"A. As far as I could remember. That is a long time ago and at that time, as I say, I didn't know that there would be anything like this to cause you to remember anything by.

"Q. Prior to the service and for about five years after he returned from the service, you and Mr. Galloway were close friends?

"A. Yes, sir.

"Mr. Dawson: I think that is all.

"Cross-examination.

"By Mr. Gold:

"X Mr. O'Neill, are you married?

"A. Yes, sir.

"X When were you married?

"A. I was married in 1912.

"X. And I assume that you were living with your wife at the time that Joseph Galloway went into the military service in 1917?

[fol. 34] "A. Yes, sir. At that time I lived on Earp Street, the number would be 210, I think.

"X Where did Joseph Galloway live at that time?

"A. Oh, at that time he had lived in South Phillips Street, in the 900 or 1000 block, around there, around that time. But previously to that time I hadn't been just sure where he was living right at the time.

"X How far away from your house was that at that time?

"A. Phillips Street crosses Karp Street, and I think he lived a couple of square- away down further on Phillips Street. In other words, Karp Street being the 1300, I think he lived in the 1400 block at Phillips Street at that time.

"X That would be how many blocks away?

"A. It is only a square or two, away.

"X You never visited him at his house, did you?

"A. No, sir.

"X And he never visited you and your wife, did he?

"A. Yes, he has been to my house.

"X How many times?

"A. I would say a dozen times, anyway, at least.

"X When you say a dozen times, you are covering the period before he went into the service and after he returned, is that right?

"A. No, I am speaking about before he went in the service.

"X How many times did he visit your home after he came back from the service?

[fol. 35] "A. I can't recall him being in my home after he come back.

"X You were working full time during the period after his return from the military service?

"A. Yes, sir.

"X What were the hours of your employment?

"A. From eight in the morning to five in the evening.

"X You are now talking about the period of April or May, 1919?

"A. That is right, yes, sir.

"X And then you would customarily go home to dinner, is that right?

"A. I would come home for dinner most every day, that is, lunch, at noontime.

"X And would you go home for dinner at night?

"A. Yes, sure.

"X What time did you arrive home?

"A. The shop was about ten minutes walk from the home.

"X Joseph Galloway didn't work at your place of employment after April or May, 1919, did he?

"A. Not that I can recall, no.

"X What work were you doing at that time?

"A. I was a rigger.

"X And, of course, during your regular hours of employment as a rigger you didn't have any contacts with Joseph Galloway, did you?

"A. Except lunch hour. I would often see him at lunch hour. He stood on the corner where I passed, and he spent [fol. 36] his time around Front and South.

"X How much time did you get off for lunch?

"A. One hour, twelve to one.

"X And I assume that inasmuch as you had to go home for lunch with your wife and family and get back to work, you didn't have much time to stand around the corners, did you?

"A. Ten minutes or so. At that time I wasn't living with my wife. My wife was sick and she was with her people. I was boarding on South Hancock Street with other people, a city fireman named Gallagher.

"X Now, how far from your place of employment did your wife's people live, or rather, did the people live with whom your wife was staying?

"A. My wife's people lived at Broad and Porter, which would be half an hour journey in a trolley car. I wouldn't know just how to describe it.

"X How long was she there after April or May, 1919?

"A. Years, anyway.

"X Was it five years?

"A. About five years.

"X Yes, about five years; and did you visit her daily after your employment was finished?

"A. Not daily, occasionally.

"X How often would you say?

"A. Twice a week, anyway.

"X So that the only opportunity which you would have [fol. 37] for seeing Joseph Galloway would be on the evenings when you were not visiting your wife, or the few minutes during the day when you were rushing to or from lunch, is that right?

"A. No, that isn't right, because I could see him also the days that I would visit my wife, either before or after.

"X Can you tell us approximately how many times you saw him in 1919?

"A. No; I seen him so often that it would be hard to give any estimate.

"X And the same goes for 1920?

"A. I wouldn't be sure about 1920. I remember him more when he first came home because there was such a vast contrast in the man. Otherwise, if nothing unusual happened, I wouldn't probably recall him at all, you know, that is, recall the particular time and all.

"X Well, do you recall him at all in 1920?

"A. I can't say.

"X And could you swear whether or not you ever saw him in 1921?

"A. I think I seen him both in 1921 and 1920 and 1921 and right on. I might not see him for a few weeks or months at a time, but I think I saw him a few times in all the years right up to, as I say, at least five years after.

"X Can you give us an estimate as to the number of times you saw him in 1920?

"A. No, I would not.

[fol. 38] "X Was it more than five times or less?

"A. In 1920 I couldn't recall whether it was one or a thousand. The time I recall him real well is when he first come home, but I know that I seen him right on from that at times.

"X And the same goes for 1921, 1922, 1923 and 1924?

"A. I would say for five years afterwards, but I don't know just when or how often I seen him except when he first come home for the first couple of months.

"X But for years after his return you couldn't say definitely whether you saw him five times or more or less, could you?

"A. No, because it was a thing that there was a vast contrast when he first come home and everybody noticed it and remarked about it and it was more liable to be remembered.

You could ask me about some more friends I knew during those years and I wouldn't know except there was something unusual.

"X Mr. O'Neill, how do you know that he came back from the service in April or May, 1919?

"A. Because he come back right after the War, that is, when a lot of them were coming home, and we were giving parties for the different ones that came home.

"X Did they all come home in April or May, 1919?

"A. No, they came home at different times. I wouldn't be sure about that. That is my honest opinion. I might be mistaken about that.

"X It might be some months after that, mightn't it?

"A. No, it was when he first come home from the Army. [fol. 39] Now, whenever that would be, I would say, to the best of my opinion, April or May.

"X Now, did you say something about his having re-enlisted in the Army?

"A. There was some talk about it. I never knew it to be the fact, and, if it was the fact, I would be surprised that he could do it owing to his mental condition.

"X And you never actually knew that he had re-enlisted in the Army or Navy after his return, did you?

"A. I knew talk of it. I didn't see him in a uniform or anything like that. I knew there was talk of it. Now, whether he told me or somebody else, or what, I can't recall.

"X You have no personal knowledge that he ever re-enlisted after he came back in April or May, 1919, have you?

"A. No, I couldn't say for sure.

"X You say when he came back he was wearing his army uniform?

"A. Oh, I am positive as to that.

"X For how long a period after his return did he wear it?

"A. I would say at least a week, it might have been more.

"X And you never saw him wear that uniform again?

"A. Well, I wouldn't be sure of that.

"X You never saw him wear a navy uniform, did you?

"A. I don't think so.

"X And, of course, if he had re-enlisted in the army or navy after April or May, 1919, you didn't see him during the periods of those re-enlistments, did you?

[fol. 40] "A. Yes, I did, but I can't recall about it. I remember he was away somewheres and he was called a wit-

ness in some case, and, wherever he was there was people that sent and got him to come to Philadelphia. But whether he was in the army or navy or where he was.

"X And did you see him when he came back on that occasion to testify in that case?

"A. Yes, but that was a man that got shot, and he was called as a witness in Court. Now, I wouldn't know that date. It seems to me that that would be around 1920 or 1921, but I couldn't be sure.

"X Was that in the City of Philadelphia?

"A. Yes, sir, that is right.

"X Did he appear as a witness for the People or for the defendant in that case?

"A. I think he appeared for the prosecutor. I am not sure.

"X In which Court was that?

"A. I wouldn't know.

"X For how long a time did you see him when he came back on that occasion to testify?

"A. I don't know. I only remember I seen him. I wouldn't know whether it was a few days or how.

"X What was the name of the man who was shot?

"A. The man who was shot was a namesake of mine, no relation, but he was a namesake of mine, John O'Neill.

"X Was Joseph Galloway, the veteran in this case a wit- [fol. 41] ness to the shooting of John O'Neill?

* * * * * * *

"A. I don't know whether he was a witness to it or a witness to some trouble that lead up to it or what it was.

"X On that occasion was he wearing an army uniform?

"A. I can't recall.

"X Did he tell you where he was?

* * * * * * *

"A. I wouldn't be sure of that. It is so long ago that I forget.

"X Are you in any way related by marriage or otherwise to Joseph Galloway?

"A. No way, shape or form.

"X During the five years from April or May, 1919, to the time that you say that Joseph Galloway left for the West, there were periods of months at a time when he was in the same mental condition as you always knew him to be before the war, is that right?

"A. He would go at times, and at others time- he would fall off again.

"X What was the name of the place that Joseph Galloway worked in at the time that he enlisted in the army?

• • • • • • •

"A. He enlisted in Cleveland, Ohio. He and another fellow were out on a job for a few days out on a job. I wouldn't be sure of the firm or what kind of work.

"X How long was he in Cleveland before he enlisted?

[fol. 42] "A. I wouldn't remember that.

• • • • • • •

"A. (Continuing:) The only thing he told me that he enlisted in Cleveland. I have got no other way of knowing only that he told me that he enlisted in Cleveland.

"X You can't help us out by saying that he was in Cleveland for a year or two or three before he enlisted?

• • • • • • •

"A. No, sir, I wouldn't say he was there a year. I would say he wasn't out of Philadelphia a year.

"X You can't tell us the exact period, can you?

• • • • • • •

"A. No, sir. That is too far back.

"X You would say that it was a period of a little less than a year, wouldn't you?

• • • • • • •

"A. I would say a little less than a year. It might be only a month or two, but I am sure it was a little less than a year.

"X Where was he working at the last time you saw him in Philadelphia?

"A. He worked along shore for the American Line.

"X When was that?

"A. Just some time before he went in the army, or before the country went into the War. It is a long time to look back and try to recall them kind of things.

[fol. 43] "X You say you were working there alongside of him?

"A. Him and I worked together at different places along the shore. In long shore you go here and there wherever they have got ships, you know.

"X Were you working alongside of him up to the time he went to Ohio?

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"X Did you work alongside Mr. Joseph Galloway up to the time he left for Cleveland, Ohio?

"A. Off and on. Long shore work is catch as catch can. We would work together today, and maybe the next day he would be working somewheres else.

"X Can you tell us the last place where Mr. Galloway worked?

"A. No, I couldn't recall all that stuff because it might be a couple of years we worked together before he went in the army. I can't be sure. I am doing the best I can here.

"X When did you first find out that there was a case brought by Joseph Galloway or by someone in his behalf against the United States?

"A. I think I got it in a letter one time he wrote from Sacramento, California. He used to write on and off maybe once a year or so. I haven't heard from him in a long time now; and then his brother spoke about it one time. He said he heard there was something going on about it, and I never heard no more of it up until I got a notice about coming here about this.

[fol. 44] "X Well, have you been corresponding with Joseph Galloway?

"A. Oh, yes. He had somebody to write to me asking about his General, what he was like, and all, after he went out of the army. That was somewhere on the West coast. I don't remember whether it was Sacramento or somewhere in California.

"X Have you received any mail from the veteran himself, from Joseph Galloway?

"A. Yes, sir.

"X When was the last time that you got a letter from him?

"A. A good while ago now. I would say a year or eighteen months.

"X Ago?

"A. Yes.

"X Have you got the letter?

"A. No.

"X Was it an ordinary friendly letter?

"A. That is right. At that time he lived on Kay Street in Sacramento. I can't recall the number.

"Redirect examination.

"By Mr. Dawson:

"R. Q. Just one or two questions, Mr. O'Neill.
"A. Yes, sir.
"R. Q. Mr. Gold put a few words in your mouth here. I want to ask you about it. He said that you wouldn't say that you didn't see him more than five times after he came back from the service. Now is that true or correct?
[fol. 45] "A. Oh, my Lord, I seen him five hundred times after he come back from the service.
"R. Q. Why is the mental condition of Joseph Galloway after his return from the service so clear in your mind?
"A. Because of the vast contrast in his actions and all, like I say. Sometimes he would be totally off his mind and other times he would be all right.
"R. Q. Was that your first impression in seeing him upon his return from the service?
"A. The first impression he was in a fog. The next day he was terrible. We thought then that he would never be right, and then after that he straightened up for a few days, and then he would vary.

"Recross-examination.

"By Mr. Gold:

"R. X And sometimes he would straighten up for a few months, wouldn't he?
"A. Yes.

"Mr. Dawson: Just a minute. Don't put—a few months.
"Mr. Gold: He said that.
"R. X For two months?
"A. I think so.
"R. X With the exception of that period immediately after his return, you can give us no information as to the approximate times that you actually saw him, can you?
"A. I can remember this now: That after he was away [fol. 46] for five or six years, he came back to Philadelphia, but I wouldn't know nothing about dates on that. He was back in Philadelphia for five or six months or so, and he

was still just evidently all right, and then he would be off. He stayed around for six months or so and then he went back. He went back to the West coast somewheres, but I can't—that would be around 1926 or so. I don't remember just how long he was away, but I would say roughly five years he come back and he stayed around the intermediate neighborhood for a while, and then he went back to the West coast.

"R. X But, coming back to that original period after his return from the service, as you testified in April or May, 1919, you cannot give us any estimate as to the number of times that you saw him except during that period soon after his return, can you?

"A. Oh, I saw him occasionally right on, right on until he went to the West, but how long a period that I wouldn't see him after the first few months I can't remember.

"R. X Was it a period of six months or longer that you didn't see him during that five-year period?

"A. Oh, no, no, not that long.

"R. X Are you absolutely certain about that?

"A. No, but I feel that way about it.

"R. X You are relying entirely upon your memory, now, aren't you?

"A. Yes, sir."

[fol. 47] Plaintiff next offered in evidence the deposition of WALTER J. WELLS.

Mr. Gerlack: This deposition was taken at Boston, Massachusetts, on March 8, 1941. The plaintiff was represented by Leo M. Harlow, Esq. of Boston, and the Government was represented by Timothy A. Curtin, Esq., Attorney for the Department of Justice.

"Direct examination.

"Mr. Harlow:

"Q. What is your name and address?

"A. Walter J. Wells, 11 Colby Street, Belmont, Massachusetts.

"Q. Sometime in 1917 did you enlist in the United States Army?

"A. Yes.

"Q. Do you remember the date?

"A. September of 1917 and I served until about September 3, 1919.

"Q. To what organization were you assigned at the time of your enlistment or induction?

"A. To the 30th Infantry.

"Q. You served with that organization how long?

"A. Sometime in—I believe it was February of 1918 when I was assigned to C Company of the 8th Machine Gun Battalion, Third Division.

"Q. At sometime during your service in the army did you become acquainted with Joseph G. Galloway?

"A. Yes.

"Q. When was that?

[fol. 48] "A. At about the time of my assignment to the 8th Machine Gun Battalion.

"Q. What were your duties?

"A. I was a private, first class.

"Q. What was Galloway?

"A. A cook.

"Q. Did you see much of Galloway during the period the organization remained in the United States?

"A. I really didn't. As far as I am concerned I did not pay much attention to him. I couldn't truthfully vouch for anything I saw him do in the United States.

"Q. At some time, the Division including your organization, embarked for services overseas?

"A. Yes.

"Q. When was that?

"A. April 1, 1918.

"Q. You landed in France at that time?

"A. Yes, in Early April. I went over on the Aquitania.

"Q. Did you serve with the Division throughout?

"A. Yes, throughout the whole period.

"Q. When did your overseas service terminate?

"A. We returned to the United States, landed at Camp Mills, about September 1, 1919, just before Labor Day.

"Q. During the period of your service in France was Galloway still assigned as cook to your organization?

"A. Yes.

[fol. 49] "Q. Did you have occasion from time to time to notice some things that Galloway did while assigned to the organization in France?

"A. Yes.

"Q. Will you tell what they were and where they were, in your own language?

"A. We landed in France about the 11th day of April, 1918, and I would say it was about April 16th when we encamped at Bricon in France, and then we went from there to this little town just beyond the railhead section, Aizonville it was. It was there that I recall the particular incident of the disturbance sometime during the night.

"Q. Describe that in your own language.

"A. We were billeted in the court yard in a building at the left, at this particular time. It was late at night that this disturbance set in, • • •

"Q. What had he been doing?

"A. Hollering, screeching, swearing, causing a disturbance.

"Q. Had anything happened to call anything to his attention at the time?

"A. Not that I know of.

"Q. How many men were present?

"A. I don't know.

"Q. Was it a few or a considerable number?

"A. I really wouldn't say the number; the men poured out from the whole section.

[fol. 50] "Q. Who was the officer?

"A. Lieutenant Warner.

"Q. Do you remember his name?

"A. Leo Warner.

"Q. Is he still in service?

"A. Yes. I don't know what his present rank is; I think he is a colonel, and I think he is in Hawaii. I just received a letter from my first sergeant telling me about the Captain and Lt. Warner.

"Q. You believe he is a Colonel or Lt. Colonel and still in the service?

"A. Yes.

"Q. Do you know what organization?

"A. No. The captain is in the Third Division.

"Q. Was there another disturbance by Galloway that you recall?

"A. The next one brought to my attention was the time at Monthurel.

"Q. This was about?

"A. That would be in June of 1918.

"Q. Describe what he did.
"A. I wasn't on the line.
"Q. Where were you?
"A. I was back on ration detail, but our positions were up ahead. I had to take rations back and forth and didn't see it.

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[fol. 51] "Q. What did you see Galloway do?
"A. I didn't see see any of it.
"Q. There was a disturbance, you know?
"A. Yes.

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"Q. When did you next see Joseph Galloway?
"A. On July 15th after the barrage came over on the 14th and the stragglers were here, there and elsewhere. All of the kitchens were shot to pieces.
"Q. Where was Galloway?
"A. Being a cook he was placed on supply duty at Battalion Headquarters.
"Q. Where did you see him?
"A. At Bosage Farm.
"Q. Were the Battalion Headquarters there?
"A. Yes.
"Q. Did you have any conversation with him?
"A. Not that I could remember; I may have talked with him because I was there for two or three days myself.
"Q. Do you recall any further incidents with which Galloway was connected?
"A. No, I do not.
"Q. Do you remember when he was relieved from duty with your organization?
"A. Yes, it was on that day.
"Q. Did you see him again?
[fol. 52] "A. I never saw him on duty with the organization after his arrest on June 18th.
"Q. Did you ever see him since your discharge from service?
"A. No.

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"Q. Did you notice anything about him other than the ordinary actions of a normal man?

"A. Personally I did not pay attention to the man. I had my own companions and went along that way.

"Q. Was he a good soldier, obeying commands and doing his duty, if you know?

"A. From what I saw of him I did not think he was very respectful to his officers and those over him.

"Q. You mean officers and non-commissioned officers?

"A. Yes.

"Q. Did you have any occasion to observe any incidents of disobedience on his part?

"A. Only as I related, but otherwise I didn't pay much attention to him.

"Q. Do you remember an incident in connection with orders not to enter a mill in the town of Aizonville?

"A. We did receive orders.

"Q. Where was this mill?

"A. The mill was just as you entered the gateway to the courtyard.

"Q. Did you personally enter that mill?

[fol. 53] "A. I had been in there at times.

"Q. Did you ever see Galloway there?

"A. I really wouldn't say.

"Q. What was Galloway's physical condition when you last saw him?

"A. His physical appearance was good.

"Q. You had no conversation with him?

"A. I really couldn't say.

"Cross-examination.

"Mr. Curtin:

"Q. When you were transferred to the Third Division, 8th Machine Gun Battalion, what company were you assigned to?

"A. C Co., I believe. I do not know when we were automatically transferred to the 8th Machine Gun Battalion, Co. D.

"Q. Were you in the same Company with Cady?

"A. Yes.

"Q. It appears from the record that it was D Co.

"A. He was Mess Sergeant in my company.

"Q. Was Galloway in that Company?

"A. I believe he was.

"Q. Do you believe, or was he actually?

"A. Yes.

"Q. In any event, Galloway, Cady and you were all members of the same company?

"A. Yes.

"Q. When you were transferred to the 8th Machine Gun Battalion was Galloway a member of that Battalion at that time?

[fol. 54] "A. I don't know.

"Q. When was the first time that you became acquainted with the fact that Galloway belonged to Co. D.?

"A. I don't know.

"Q. How soon after you were transferred in February?

"A. I really couldn't say.

"Q. It was sometime before you went overseas in April?

"A. Yes.

"Q. How many men were there in your Co. D., approximately?

"A. Approximately 250 men.

"Q. The first time you noticed anything out of the ordinary about Galloway was the incident where he was hollering and creating a disturbance at Aizonville, that was in June?

"A. That would be in April.

"Q. In April?

"A. Either April or May. We left there the 29th of May. It would have to be between the 17th of April and the 28th of May.

"Q. That was before you went into the lines?

"A. Yes.

"Q. What part of the organization did you belong to?

"A. I was assigned to gun position for a period, then I was a runner during other periods.

"Q. In this capacity you had no obligation to get in touch with Galloway during action of your company?

"A. No.

[fol. 55] "A. No.

"Q. You had to work around a gun and he had work in a kitchen?

"A. Yes.

"Q. Did any of these episodes occur when he was on duty in the kitchen?

"A. No.

"Q. So far as your recollection is concerned, he carried on his duties as a cook all right?

"A. Yes.

"Q. This episode that happened, the first one in April or May, do you know the reason for that?

"A. No, it was during the night.

"Q. Were any of the men asleep?

"A. Yes; I was myself.

"Q. You do not know what caused it; if it were due to a nightmare or hazing on the part of other soldiers?

"A. No.

"Q. Did you observe all of these things; did you see them take Galloway out of the billet?

"A. No.

"Q. Did you see the officers tie him?

"A. No.

"Q. Did you see it?

"A. No, not personally.

• • • • • • •

"Q. The next incident was in June 1918, as I understand it?

[fol. 56] "A. Yes.

"Q. Just what happened on that occasion—what brought up the incident?"

The following answer was stricken by the Court:

"A. We were supposed to have gone ahead. This is the incident where he was yelling: 'The Germans are coming, the Germans are coming'. The alarm was sent out and patrols were sent out to find out where they were. He was arrested under the head of causing a disturbance by setting off that rumor that they were coming.

"Q. The occasion for that was that he told a great many people?

"A. Yes."

"Q. Did you hear him hollering?

"A. No.

"Q. Whatever you know about that episode is based on what someone told you happened.

"A. Yes.

"Q. You have no personal knowledge of any of these occurrences that you testified to?

"A. No.

"Q. How far back would you say he was from the trenches?

"A. We were in bushes, buildings, etc.

"Q. Was Galloway connected with the kitchen?

"A. No, not at that time.

"Q. Do you know as a fact that he was not?

"A. He was not.

[fol. 57] "Q. When did he cease to be a cook?

"A. I do not know.

"Q. Was he with those taking part in the firing and charging?

"A. Yes.

"Q. How many were there?

"A. Each group had a machine gun crew of eight men.

"Q. Were they divided up into squads?

"A. Yes.

"Q. How close to your squad was the squad in which Galloway was a part?

"A. He was at company headquarters on the food rations.

"Q. So that you do not know what he was doing or where he was during June?

"A. No.

"Q. Just how long a period was your company in the lines?

"A. Until July 1st.

"Q. When did you go in?

"A. Went in June 1st.

"Q. During this time that you describe you had no opportunity to observe Galloway, see what he was doing as a soldier in your organization?

"A. No.

"Q. You had no opportunity to notice his conduct towards officers, both commissioned and non-commissioned up there?

"A. No.

"Q. You saw him again; you did not see him during June?

[fol. 58] "A. About July 15, 1918.

"Q. At that time where was he?

"A. Battalion Headquarters, Bosage Farms.

"Q. Was he in the guard house?

"A. No.

"Q. What was he doing?

"A. Serving food to the stragglers.

"Q. Working in the kitchen?

"A. Yes.

"Q. How many men working with him?

"A. I do not know.

"Q. You were there two days?

"A. Yes.

"Q. What was he, Galloway, doing in the line of duties?

"A. I didn't pay much attention to him.

"Q. Did you go for food three times on the first day?

"A. I really couldn't say.

"Q. Well they were serving three meals a day and you naturally would go for them?

"A. We were lucky to get one.

"Q. Was the Battalion Headquarters some distance back from the lines?

"A. Yes it was.

"Q. They had kitchen facilities there?

"A. It was a house.

"Q. Your recollection is that they had kitchen facilities [fol. 59] and were serving the stragglers?

"A. Yes.

"Q. At what hours were they serving?

"A. Any time during the day we would be served if we got there within a reasonable time.

"Q. At least for the two days you were there you said that this was where Galloway was working as kitchen helper or cook?

"A. Yes.

"Q. How many times did you see him?

"A. I really couldn't say.

"Q. Well, in your recollection?

"A. I don't know how many times I went up to get a bite to eat.

"Q. Each time you went up he was working?

"A. Yes.

"Q. Is there anything to your knowledge at that time that you described to me that would indicate that this man was under arrest?

"A. No.

"Q. So that from your personal knowledge there is nothing to base your statement on that he was under arrest at headquarters?

"A. No.

"Q. When was it that he left your organization?

"A. Whatever time that incident occurred up on the front within the month of June.

"Q. He left your company right after the episode in June?

"A. Yes.

[fol. 60] "Q. Where did he go?

"A. Battalion Headquarters.

"Q. Still part of your battalion?

"A. Yes.

"Q. What was he doing?

"A. I had no knowledge as to what his work was.

"Q. Did you have an opportunity to observe him while he was at Battalion Headquarters?

"A. No.

"Q. When was the next time you saw him after July 15th?

"A. I don't remember having seen him again. We went forward on July 18th across the Marne.

"Q. You don't know whether he went with Battalion Headquarters or stayed behind?

"A. No.

"Q. Did you know that he was in the hospital from September 18, 1918 to January 3, 1919?

"A. No.

"Q. You made a statement, Mr. Wells, when you were asked by Mr. Harlow what you observed other than the ordinary actions of a normal man, about his actions toward his superior officers—what episode happened that would give you the impression that he did not obey his superior officers?

"A. I could hear him swearing at them in the incident at Aizonville in April or May.

"Q. That was one night?

[fol. 61] "A. Yes.

"Q. You didn't know what was the cause of that?

"A. No, I don't know what brought that on.

"Q. Any other incident besides that one?

"A. Not that I can recollect.

"Q. So that statement relative to his being disrespectful to his superior officers is based on that one incident?

"A. Yes.

"Q. You had a certain group that you hung around with?

"A. Yes.

"Q. Was he a member of that group?
"A. No.
"Q. You never had any experience or association with his personally except the fact that he belonged to the same battalion?
"A. No.
"Q. You don't know what his activities were socially?
"A. No.
"Q. Did you know any of the group he was with?
"A. No.

"Re-direct examination.

"Mr. Harlow:

"Q. At Aizonville, Mr. Wells, you did see him when he was bound and gagged?
"A. I didn't see him bound and gagged.
"Q. Describe what you did see?
"A. I heard the hollering and screaming and the officers went up to quiet him, the result was • • •
[fol. 62] "Q. What did you yourself see?
"A. I saw the result, a black eye for Lt. Warner.
"Q. Did you see any gag on Galloway?
"A. No.

"Recross examination.

"Mr. Curtin:

"Q. You heard somebody swearing and cursing?
"A. Yes.
"Q. Did you know Galloway's voice in that confusion?
"A. Yes.
"Q. As a particular voice, or was there a general disturbance?
"A. I seemed to know it was he.
"Q. How often had you spoken to the man during the time you had known him?
"A. I don't know.
"Q. You actually got acquainted with a person's voice in that time sufficient to know it was Galloway's?
"A. Yes.
"Q. You didn't see him?
"A. No, but I know that Galloway was the one.

"Q. You didn't see him bound and gagged at any time?
"A. No.
"Q. You didn't see the officer get the black eye?
"A. I saw the result.
"Q. You didn't see who gave it to him?
"A. No."

[fol. 63] JOHN TANIKAWA, a witness called on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct examination:

Mr. Gerlack:

Q. Mr. Tanikawa, are you an American citizen?
A. Yes, sir.
Q. Where were you born?
A. I was born in Hawaii.
Q. Did you serve during the World War?
A. Yes, sir.
A. What organization?
A. Company B, 8th Machine Gun Battalion.
Q. That is Company B, 8th Machine Gun Battalion of the 3rd Division?
A. Yes, sir.
Q. And did you know Joseph Galloway, the man that sits here in a white suit?
A. Yes, sir.
Q. Was he also a member of that company?
A. Yes, sir.
Q. When did you first meet him in the company?
A. Met him about November, 1917, at Camp Greene, North Carolina.
Q. Where did you enlist in the service?
A. New York City.
Q. You first met him in Camp Green-. Do you remember when?
A. I think December, 1917.
Q. December, 1917?
A. If I am not mistaken.
Q. By the way, I neglected to ask you where you live.
A. 305 U Street, Sacramento.
Q. How long have you lived at Sacramento?
A. 14 years.
Q. What is your business?

A. Ice man.

Q. What company are you connected with?

[fol. 64] A. State Ice Company.

Q. The State Ice Company, that is here in Sacramento?

A. Yes, sir.

Q. Now, just tell the jury in your own words, Mr. Tanikawa, how Mr. Galloway appeared to you as you first knew him and observed him at Camp Greene, North Carolina, in December, 1917?

A. Well, he was just a regular soldier, very normal.

Q. At that time did you notice anything unusual about him, so far as appearance is concerned, or conversation?

A. No, sir.

Q. Did he appear perfectly normal at that time?

A. Yes, sir.

Q. How did he appear so far as clothes and uniform, as to whether or not he kept them neat?

A. Oh, he was pretty neat.

Q. As neat as the other soldiers in the company?

A. Yes, sir.

Q. You were in the same company with him, were you?

A. Yes, sir.

Q. Were you in the same squad?

A. Yes, sir.

Q. Now, did you go overseas with him?

A. Yes, sir.

Q. What ship did you go over on?

A. I went on the "Aquatania".

Q. The "Aquatania", the big British ship?

A. Yes.

Q. Did you notice any change in his appearance or condition as you observed him after you got to France from the way what it was when you first got to Camp Greene, North Carolina?

A. Well, he was getting nervous after we reached France, and he was kind of irritable, always picking a fight with other soldiers.

Q. Fighting with other soldiers?

A. Yes.

Q. When did you notice that?

[fol. 65] A. At the training camp in Aizonville (witness' spelling).

Mr. Gerlack: Aizonville, A-i-z-o-n-v-i-l-l-e, that is how it is spelled.

Q. Now, did you ever notice he was nervous or quarrelsome before he left the States?

A. No, I didn't, sir.

Q. How well did you know him before you went to France?

A. We slept in the same barracks.

Q. And you were members of the same squad?

A. Yes, sir.

Q. There were eight men in a squad at that time?

A. Yes, sir.

Q. What kind of a squad was it?

A. A Machine gun squad.

Q. One machine for each squad?

A. Yes, sir.

Q. What was his position in the squad?

A. He was No. 4 man.

Q. No. 4 man?

A. Yes, sir.

Q. And at that time did the organization call for a corporal and gunner and six other men in the squad?

A. Yes.

Q. And what was your position in the squad?

A. No. 3 man.

Q. No. 1 is the gunner, and No. 2 is the loader?

A. No. 2 carries the tripod.

Q. Oh, and No. 3 was the loader?

A. No. 3 was the loader.

Q. Now, with what machine guns were you equipped at that time?

A. Hotchkiss.

Q. Did you observe anything unusual that happened to Mr. Galloway after you reached France, anything that he did? You say he became nervous and was quarrelsome. Did you observe any incident that happened so far as he was concerned in the Company after you reached France?

• • • • • • •

[fol. 66] Mr. Gerlack:

Q. What did you see?

A. I saw him in jail.

Q. You saw him in jail for the incident?

A. Yes, sir.

Q. When was the next time? Did you see him—any other incident that you know of, that you saw, yourself that happened?

A. Why, when we were on the Marne——

Q. When was that?

A. That was June, 1918.

Q. June, 1918. You say the Marne; you mean the Marne River, in France?

A. Yes, sir.

Q. Were you in a reserve or training area, or up to the front lines?

A. Right up to the front line.

Q. Was your company on the banks, or away from the banks?

A. The Germans were on the other side and we were on this side.

Q. The Germans were on the other side. Were you in the trenches?

A. No, not in the trenches, we were in the forest.

Q. Were there any trenches on the front at that time?

A. No, that was a new front.

Q. That was a new front and they hadn't had time to dig trenches. Just tell us what you saw and what happened at that time.

A. One night he screamed.

Q. Did you hear it, yourself?

A. Yes.

Q. What happened?

A. He said, "The Germans are coming," and we all gagged him.

Q. Who gagged him?

A. The other soldiers.

Q. Did you see this, yourself?

A. Yes.

Q. You saw him gagged?

A. I helped to gag him.

[fol. 67] Q. You helped to gag him, yourself?

A. Yes, sir.

Q. What was he doing at the time he cried out the Germans were coming?

A. He was on the guard.

Q. He was what?
A. He was on the guard at that time.
Q. Were the Germans coming?
A. No, sir.

• • • • • • •

Mr. Gerlack:

Q. Were you on guard that night?
A. Yes, sir.
Q. How far away were you from him?
A. Oh, I was about twenty feet.
Q. About what, how many feet?
A. About twenty feet.
Q. Did you see anything to lead you to believe the Germans were on that side of the Marne River?
A. No, sir.
Q. Did anything happen, any disturbance in the vicinity just prior to the time that he cried out the Germans were coming, to lead you to believe the Germans were coming?
A. Now, the Germans were coming, the way I understand the Germans were getting ready for a big drive, and the idea is not to let them know we are there.
Q. Was there any action, I mean was there any shooting going back and forth at that time?
A. No, sir, no shooting.
Q. Just on guard, the Germans on one side of the river and you on the other side?
A. Yes.
Q. And you saw nothing to lead you to believe that the Germans were coming, although you were only twenty feet from him?
A. No, sir.
[fol. 68] Q. Was your whole squad on guard duty that night?
A. Yes, sir.
Q. By the way, what did they do with him after they bound and gagged him, as far as you know?
A. They kept him—he was court martialed.
Q. How is that?
A. They kept him and court martialed him. I don't know what they did with him.
Q. Did you talk to him that night?
A. To him?

Q. Yes.

A. No, you couldn't talk to him.

Q. Why couldn't he talk?

A. He was out of his mind.

Q. You mean he was out of his mind that night?

A. Yes, sir.

Q. Would you say the way he acted that night he appeared sane or insane?

A. Insane to me.

Q. He appeared insane to you that night?

A. Yes, sir.

Q. Up to that time that you went to France, as far as you observed, did he appear to be a good or bad soldier?

A. He was a good soldier.

Q. Up to that time you first noticed he became nervous. When is the first time you noticed he disobeyed his officers and became cross with the other soldiers?

A. After we reached France.

* * * * * * *

Mr. Gerlack:

Q. Well, did you ever know him to disobey the officers?

A. Not that I know of.

Q. Not that you know of. I believe the Third Division went through the Argonne?

A. Yes.

Q. Did you and Mr. Galloway go through the Argonne [fol. 69] fight with the Division?

A. Yes, sir.

Q. When did you go over the top in the Argonne?

A. October 1st.

Q. How is that?

A. October 1, 1918.

Q. Where was the Division on the initial jump-off of September 26th?

A. I think it was Mount Cunel (witness' spelling).

Q. When the Argonne started were you in the front line, or reserve—when did you go into action on the Argonne?

A. October 1st.

Q. Was Calloway with the outfit then?

A. Yes, sir.

Q. Did you notice anything unusual happen to him during the Argonne fight?

A. Yes, sir, he was acting queer.

Q. Do you know whether or not he was wounded?
A. Yes, that is what I heard.
Q. Just what you saw, yourself.
A. No, I didn't see him get hurt.
Q. Were you wounded, yourself?
A. Yes, sir.
Q. When did Galloway leave the 8th Machine Gun Battalion?
A. I don't know.
Q. When did you leave? When did you come back to the States.
A. I came back August 18.
Q. Did you go up with the Army of Occupation after the Armistice?
A. No.
Q. Did Galloway?
A. I don't know.
Q. Do you know what happened to him after the Argonne fight?
A. I heard he went to the hospital.

[fol. 70] Mr. Dillon: I will object——

Mr. Gerlack:

Q. Just what you know, just tell us what you know.
A. I heard he went to the hospital.
Q. You didn't see him after that?
A. No, sir.
Q. When did you see him after the Argonne up to the present time?
A. I see him in 1936 here in Sacramento.
Q. You saw him in 1936 here in Sacramento?
A. Yes.
Q. Now, generally speaking—By the way, where did you first see him? How did you come to see him in Sacramento, here?
A. Why, I met him at the D. A. V. Post, here.
Q. You mean the Disabled Veterans' organization?
A. Yes.
Q. Just tell us what you observed then.
A. Why, I was sitting in the chair and he walked in the door and right away I recognized him, but he didn't recognize me, so I told him who I am, then he knew.

Q. You talked to him on that occasion, did you?

A. Yes, sir.

Q. Would you say then as you talked to him he appeared sane or insane in 1936?

A. Why, he looks to me like he wasn't all there.

Q. What do you mean by he looks to you like he wasn't all there? Do you mean he was sane or insane?

A. Oh, insane, I should say.

Q. And you have talked to him since then, have you?

A. Yes, sir.

Q. Do you consider at the present time, based upon your observation, that he appears to you to be sane or insane?

[fol. 71] A. I think he is insane.

Q. Do you see any great difference in him? How does he appear now as to the way he acts and everything, as compared to the way he acted in France, particularly when they gagged him when he said the Germans were coming?

A. About the same.

Q. As far as mentality is concerned you would say about the same?

A. Yes.

Cross-examination.

Mr. Dillon:

Q. This incident which you recall when he was on guard duty and thought the Germans were coming, what was the date of that?

A. I don't know the exact date, but that was June, 1918.

Q. June, 1918. Then you say following that he was still with the Battalion in October when they were fighting in the Argonne?

A. Yes, sir.

Q. You are sure about that? If the official records would show as a matter of fact he was in the hospital with influenza from September to December would that refresh your recollection?

A. He was in the hospital?

Q. Yes, from September to December.

The Court: Maybe he doesn't understand "the record". Explain that more fully. You are talking about records.

Mr. Dillon:

Q. The records from the Adjutant General's Office of the United States Army show that Mr. Galloway was in the hospital from September '18 until December '18. Now, then, you say it is your recollection he was in the Argonne [fol. 72] fight in October '18. Now, that is a long time ago, and I am asking you if when I tell you he was in the hospital in September, October, November and December, does that now refresh your recollection as to whether he was in the Argonne, or not?

A. Why, I saw him on the Argonne.

Q. In October '18?

A. Yes, sir. Maybe he was—he didn't go to the hospital, just dressing station, I guess.

Plaintiff then read into evidence the deposition of Lieutenant Colonel Albert K. Mathews, Chaplain, United States Army. This deposition was taken at Brownwood, Texas, on July 14, 1941. The Plaintiff was represented by R. R. Holloway, Esp., and the defendant was represented by Frank Potter, Esp.

"Direct examination.

By Mr. Holloway:

"Q. State your name?

"A. Albert K. Mathews.

"Q. Are you in the service of the United States Army?

"A. Yes.

"Q. In what capacity?

"A. Chaplain, Lieutenant Colonel, VIII Army Corps, Brownwood, Texas.

"Q. How long have you been in the service?

"A. All together 27 years, three years enlisted man, and after a ten year interval commissioned as Chaplain in [fol. 73] the regular army in 1917.

"Q. In 1917 did you say?

"A. Yes, sir.

"Q. During the period between December 7, 1920 and May 6, 1922, were you a Chaplain in the United States Army?

"A. Yes.

"Q. Where were you stationed at that time?

"A. Fort MacArthur, located at San Pedro, Los Angeles Harbor, California.

"Q. State whether or not you recall knowing an enlisted man by the name of Joseph Galloway during that period?

"A. I did.

"Q. State what contact or conversations, and what was the occasion of your knowing him?

"A. Private Galloway came to my attention while performing my regular duty, visiting the hospital at Fort MacArthur. On the occasion of my first meeting Private Galloway, he was a patient in the mental ward at the Fort MacArthur Sation Hospital.

"Q. In addition to being a patient state whether or not he was also a prisoner?

"A. He was a prisoner by reason of the fact that he was under charges of violation of either the 58th Article of War, which concerns desertion, or the 61st Article of War, which concerns absence without official leave, he was under restraint therefore as a prisoner, and under observation for [fol. 74] his mental condition.

"Q. State, as near as you can recall at this time, when you knew him and the number of times you had occasion to talk with him?

"A. As I recollect it was in 1920 when he first came to my attention and was under my daily observation as I visited each patient in the Station Hospital, as I now recall it was for a period of perhaps six weeks.

"Q. Did you notice anything unusual about his condition, or actions, if so state what?

"A. I noticed that he was mentally deranged because of the fact that I would usually find him abnormally depressed, he would then usually, immediately and excitedly launch into a discussion of what, to his understanding, was discrimination on the part of the military authorities in failing to give him a disability discharge, it was with difficulty that I could divert his mental processes during these conversations.

"Q. As I understood your previous answer, you have been a Chaplain since 1917?

"A. Yes, sir, continuously.

"Q. During that time has it been a part of your duty and practice to visit soldiers afflicted with mental disorders?

"A. Yes, sir, it has.

"Q. State to what extent, in a general way, has been your [fol. 75] practice?

"A. I have been intensely interested in the study of mental cases, have read widely and have observed during my service perhaps hundred of mental cases; by reason of observation of symptoms I have been able to inform myself as to certain classifications of mental derangements.

"Q. State whether or not during your period of service as Chaplain you have observed a large number of soldiers afflicted with various kinds and diseases of disorders?

"A. I have.

• • • • • • •

"Q. Colonel, you may continue your statement of your observation of soldiers with reference to mental disorders?

"A. Chaplains of the army are called frequently by medical officers and nurses to quiet patients who are undergoing certain hysterical moments.

"Q. Have you been called in for that purpose?

"A. I have many times. I do not claim that I have completed any university course as prescribed, I claim only observation and study of texts concerning various nervous forms of mental derangement.

"Q. State whether or not, based upon your studies and observation that you have previously outlined, state whether or not you have formed an opinion as to the mental condition of Private Galloway?

• • • • • • •

[fol. 76] "A. I did form an opinion.

• • • • • • •

"Q. With reference to Private Galloway state what, if anything, you noticed about that man with respect to any interest, or lack of interest in his surroundings?

"A. He seemed to have no interest and showed no interest in army life in general, he was confined both as patient and prisoner. He manifested no interest in anything outside of his own claim. He acted as one who is identified as an egocentric.

"Q. State what, if anything, you noticed with reference to his failure of lack of attention and concentration?

"A. Only that it was extremely difficult to divert this soldier from that which I identified as a monomania, in

that he couldn't apparently concentrate on any other subject which I would introduce for discussion.

"Q. Did you notice any indication of mental breakdown?

• • • • • • •

"A. I did.

"Q. What did you observe in that respect?

"A. Abnormal and uncalled for excitement.

"Q. What was the occasion of his excitement?

"A. His apparent feeling that he was being mistreated to the point of martyrdom; this without any justification in fact.

[fol. 77] "Q. Do you recall at this time, over this lapse of years, anything he said along that line?

"A. I do not.

• • • • • • •

"Q. State what, if anything, you noticed with reference to Galloway's being or appearing exhausted?

"A. As I have said, he always seemed to be in a state of depression.

"Q. Did he say anything with reference to being tired or exhausted?

"A. I do not remember that he did.

"Q. What, if anything, do you remember with reference to his appearing exhausted, for no apparent reason, after trying for an hour or so to work?

"A. His general appearance was that of mental exhaustion.

• • • • • • •

"Q. Did you obtain that impression as a result of your conversation and observation of Galloway?

"A. I did.

• • • • • • •

"Q. You have already stated how he appeared with reference to his being exhausted; state whether or not there was any apparent reason for his being exhausted other than his own condition.

"A. Not to my observation.

"Q. State whether, in your opinion at the time you ob-

[fol. 78] served Galloway, he was rational or irrational?

• • • • • • •

"A. I considered that he was irrational.

"Cross-examination.

By Mr. Potter:

"Q. Colonel Mathews, was the period which you testified about in your direct examination the only contact you ever had with this man Galloway?

"A. Yes, sir, with one exception, sir; I was requested to give an affidavit by the relatives of this soldier Galloway on or about the time of his being released from the service; to the best of my recollection I furnished this affidavit, I can be mistaken only that it may have been a deposition instead of an affidavit, but it was one or the other.

"Q. Did you see Galloway personally at that time?

"A. Not at the time I gave the affidavit.

"Q. The only time you say him personally was during the time he was confined at the Station Hospital at Fort McArthur.

"A. That is correct.

"Q. Over what period of time was that?

"A. To the best of my recollection, it was a period of six weeks.

"Q. Beginning when?

"A. Beginning, to the best of my recollection, in the early [fol. 79] part of 1920.

"Q. And your testimony is that he was serving as a soldier in the United States Army at that time?

"A. Yes, sir.

"Q. You are certain that the man you visited in the hospital an concerning whom you have testified about is the same party on whose behalf this law suit has been brought?

"A. Yes, sir.

"Q. I will ask you, is it a fact this party listed in the navy service on January 15, 1920 and served in the United States Navy until he was discharged on July 8, 1920?

"A. I have no recollection of ever having had that information, I can be mistaken as to the time of these contacts, but to the best of my recollection those contacts during these six weeks was in the early part of 1920, I can be mistaken as to that period when I did observe this soldier.

"Q. If it is true that he was serving in the United States Navy from January 15, 1920 to July 8, 1920, he would not have been a patient in the base hospital at Fort McArthur, would he Colonel?

"A. That is true.

"Q. You could be mistaken as to whether or not the person with whom you came in contact was the plaintiff in this suit, could you not?

[fol. 80] "A. I could be mistaken as to that. Might I add, sir, that I could not now identify that soldier if I were to meet him face to face, and that is because of a long lapse of time.

"Q. During that time you have no doubt come in contact with thousands of United States Army men?

"A. That is true.

"Q. You testified on direct examination, did you not, that your service as a Chaplain in the United States Army has been continuous since that time?

"A. Yes, sir, since 1917.

"Q. You are not acquainted with the fact then that Galloway was discharged from the United States Army on April 29, 1919.

"A. No, sir, I am not acquainted with it.

"Q. You have no way of telling whether that is correct or not?

"A. No, sir, I have no way of telling.

"Q. During the time that you have testified about, the person concerning whom you have testified was in a disabled condition was he not, Colonel, and actually hospitalized and being confined in the hospital?

"A. Yes, sir.

"Q. Was he in bed?

"A. Yes, sir. He is what you call a bed patient.

"Q. Colonel, do you know anything about this man's personal habits?

[fol. 81] "A. No, sir. I do not.

"Q. Do you know whether he was a drinking man?

"A. No, sir. I do not.

"Q. Do you know whether or not he was addicted to the use of narcotics?

"A. No, sir. I do not.

"Q. Do you have any personal knowledge of his conduct during the time that he served in the army?

"A. No, sir.

"Q. I believe you testified that at the time you came in contact with him he was under restraint?

"A. True. Yes, sir, he was under charges of violation of the military organization under the 58th Article of War,

which is desertion, or the 61st Article of War, which is absent without official leave.

"Q. Colonel, will you please give the period of your service at Fort McArthur?

"A. Yes, sir, I returned from France in February, 1919, and was ordered to duty at Fort McArthur in March of 1919, and served continuously at Fort McArthur thereafter until April 1925.

"Q. And your only personal contact with Galloway was during the period of hospitalization?

"A. Yes, sir, except in a general way during which time I would have no specific observation of him.

"Q. And to the best of your recollection that was in the [fol. 82] early part of 1920?

"A. Yes, sir.

"Redirect examination.

"By Mr. Holloway:

"Q. Colonel, is it possible that your observation of Joseph Galloway was during the year of 1921 or 1922?

"A. It is possible, sir, but not to the best of my recollection. I have no way of determining at this time the exact year. I am sorry that I can't help the counsel, but I can only say the early part of 1920 is the best of my recollection. I do know that I had contact with the soldier by the name of Joseph Galloway during a period of six weeks where he was a patient-prisoner in the Station Hospital at Fort McArthur.

"Q. Do you have a copy of the affidavit or deposition, whichever it was, that you previously furnished, with reference to this man Galloway?

"A. I do not have such a copy.

"Q. Have you been called upon, prior to this time, to give testimony in other cases with respect to the mental condition of the man involved?

"A. Yes, sir, I have.

"Q. And have you testified in other cases, giving testimony with reference to the mental condition of the soldier under investigation?

"A. Yes, sir, not as an expert, however, but only as a [fol. 83] layman's opinion.

"Q. By layman do you mean a non-medical man who does not consider himself qualified as an——

"A. I am not an alienist, and do not consider myself as an expert.

* * * * * * *

"Q. Colonel, you have no medical training?

"A. No, sir.

"Q. You have already stated your opinion with reference to the mental condition of Joseph Galloway during the period that you observed him?

"A. That is true.

"Q. State whether or not that opinion is based upon your studies of the subject, your observation of other men who had mental disorders, and the conduct of Galloway at the times that you visited him?

"A. That is true.

"Q. Based on all of the matters which you have outlined is it still your opinion that his mental condition was abnormal?

"A. That is my opinion.

"Q. Did you consider him of unsound mind?

"A. Yes, sir."

[fol. 84] Plaintiff next read in evidence the deposition of COMMANDER COMFORT B. PLATT of the United States Navy, taken at Washington, D. C. on March 10, 1941. Plaintiff was represented by Warren E. Miller, Esq., and the defendant by David A. Turner, Esq.

"Direct examination:

By Mr. Miller:

"Q. Will you please state your name, residence and occupation?

"A. Comfort Benedict Platt, Commander, U. S. Navy, retired.

"Q. And your address is——

"A. On duty at the Navy Department, Washington, D. C.

"Q. Were you the executive officer on board the Olympia during 1919 and 1920 while that vessel was on the Adriatic Station?

"A. Yes.

"Q. While you were there in that capacity was one Joseph Galloway also serving on the same ship?

"A. Yes.

"Q. State in your own words Commander Platt what you recall with reference to him at that time?

"A. I recall that he caused considerable trouble to the Commanding Officer by disobedience of orders and jumping ship and matters along that line. After repeated warnings and punishments, leading to court martials I believe he was finally sentenced by a summary court martial for a bad conduct discharge from the U. S. Navy.

[fol. 85] "Q. What do you mean by 'jumping ship' Commander?

"A. You might change that to 'leaving ship' without *aut* permission.

• • • • • • •

"Q. What do you recall about his conduct at that time and place so far as its correctibility was concerned?

• • • • • • •

"The Witness: As I stated previously, he was not amenable — discipline and the result was that he was discharged with a bad conduct discharge.

"By Mr. Miller:

"Q. And why was he discharged for that reason?
"A. Isn't that given there?
"Q. Just answer the question.
"A. It was punishment for disobedience.

• • • • • • •

"Cross-examination.

"By Mr. Turner:

"Q. You say that was in 1919 and 1920?
"A. Yes.
"Q. And on board the Olympia?
"A. Yes.
"Q. And what was your rank at that time?
"A. I believe it was Lieutenant-Commander.
"Q. Were you in command of the ship?
"A. I was second in command; acting as Executive Officer —second in command.

[fol. 86] "Q. And do you have a personal recollection of this man Joseph Galloway?

"A. Only so far as that I do remember the name and that he did cause lots of trouble on the ship.

"Q. Do you recall what sort of looking man he was?

"A. No.

"Q. Do you recall his rank?

"A. No, I do not recall his rank.

"Q. Do you or have you had an opportunity——

"A. (Interposing:) I would change that last sentence. He was an enlisted man.

"Q. Now, have you examined the records of the Navy Department at any time recently in regard to this case?

"A. Not recently. I believe that I investigated his record when drawing up a reply to a letter received from Mrs. Freda Galloway, who stated she was the wife of this man.

"Q. When was that?

"A. The date I wrote Mrs. Galloway was the 31st of July 1933.

"Q. July 31, 1933?

"A. Right.

"Q. And that was in reply to a letter from her addressed to you requesting information in this case?

"A. Yes.

"Q. At that time you looked up the Navy Department's records pertaining to Joseph Galloway during the term of the enlistment concerning which you are testifying?

[fol. 87] "A. I think so.

* * * * * * *

"Q. Did the communication which you had from Mrs. Galloway in 1933 give you information concerning Joseph Galloway which you would not have known of your own knowledge, and particularly with reference to his service in 1919 and 1920 on the Olympia?

"A. I believe it probably refreshed my memory and helped me to recall to mind that a man of that name was on the Olympia, while I was Second Officer, and that his conduct was a source of considerable trouble.

"Q. Commander, do you have a personal recollection of him and of his record at the present time independently I mean of any writing from Mrs. Galloway or any writing in the Navy Department?

"A. I have a slight recollection, as I have stated previously that such a man by the name of Galloway did cause considerable trouble at that time.

"Q. And aside from that of course you have no independent recollection other than that you had such a man on board ship and that he did cause some considerable trouble; is that correct?

"A. That is correct.

"Q. Now, Commander, that was in the year 1920, wasn't it?

"A. 1919-1920, thereabouts.

"Q. You could not testify exactly when?

[fol. 88] "A. No.

"Q. State whether or not you know whether this man had had a prior enlistment in the U. S. Army, before he went into the Navy.

"A. I understood that he did have a partial enlistment in the Army previously, yes.

"Q. Now, Commander, if you have a recollection of this man as you have testified, you recall that this bad conduct was occasioned by drunkenness, for the most part, wasn't it?

"A. I don't know. I don't recall his drunkenness. As I have said, just his leaving ship without authority. It is quite probable that it was, though I have no——

"Q. (Interposing) All right.

"A. (Continuing) —clear recollection.

"Q. You have no knowledge of his history subsequent to that service on board the Olympia?

"A. No, sir.

"Q. Could you tell us when you began your service on the Olympia and when you terminated it?

"A. I can't give you the exact dates. I think I joined perhaps in June, 1919, and was detached I believe approximately two years later.

"Q. Now, you don't know, of course, personally that the man concerning whom you have slight recollection is the same person as Joseph Galloway, who is the plaintiff in this lawsuit pending in the Northern Division of the United [fol. 89] States District Court for the Northern District of California, styled Joseph Galloway, by Freda Galloway, his guardian, plaintiff, vs. United States of America, No. 1582-R, do you?

"A. No."

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DR. E. M. WILDER, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct examination.

Mr. Gerlack:

Q. Doctor Wilder, are you a licensed physician and surgeon, licensed to practice as such in this State?

A. Yes, sir.

Q. And of what medical school are you a graduate?

A. Medical Department, University of California.

Q. What year?

A. 1900.

Q. Have you practiced your profession as a physician continuously since that time?

A. Yes, sir.

Q. In the past—by the way, what specialty, if any, do you have?

A. I can't say that I have any specialty that I entirely apply myself to. I have given special attention to mental diseases for the entire time I have been practicing.

Q. Doctor, since leaving medical college what experience have you had from the standpoint of neuro-psychiatry?

[fol. 90] A. Well, my first service was at the Napa State Hospital; that was in nineteen hundred one, two and three. In 1903 I was licensed by the State Commission of Lunacy, as the law required in this State at that time—I was licensed to advise superior judges about commitments to the Asylum, and I served under that authorization until the law was changed, the old Commission of Lunacy was abolished. I have been called by superior judges ever since for thirty-five years. I have been qualified as an expert of the Superior Courts of half a dozen of our counties here, and qualified in the District Court, Federal Court here on a number of cases.

Q. As a psychiatrist?

A. Yes, sir.

Q. Doctor, what does the term "neuro-psychiatry"—what does "neuro-psychiatry" embrace, Doctor? What does it mean?

A. A Neuro-psychiatrist is one who studies the operation of the nervous and mental system of the human body.

Q. Does that include insanity?

A. Yes, sir.

Q. Does that include such diseases as manic depressive psychosis and dementia praecox and paranoia?

A. Yes.

Q. Just tell us, Doctor, what the words "dementia praecox" mean?

A. Well, dementia praecox is a classification of a certain type of insanity that they have used for many years. "Dementia" is a lack of mind; "praecox", an early lack of mind. The expression was originally adopted in distinction from those beginning dementiae or loss of mind that [fol. 91] we generally associate with old age, which is the senile dementia, which we are all familiar with, the second childhood. Dementia praecox was a title to cover cases where in early life or early middle life people began to break down. In later years it has been subdivided and there are several different types of dementia praecox, all of them showing, as an essential, the gradual loss of mind, comparable to the loss of mind of old people, and certain other factors.

Q. Now, Doctor, take this condition of dementia praecox. Will you tell us what some of the outstanding symptoms of the disease are, so far as especially a layman would observe?

A. Well, your dementia praecox has been, as I say, subdivided now into a number of different types, and I think the commonest one is one we call a schizophrenic form of dementia praecox.

Q. What does that word mean?

A. It is a word from the Greek "schizo" split, divided, and of course, the other, "phrenic" part of it means "mind", and it means that it is a disease in which a person's mind is divided or split, and it works about this way: That normally a person is interested in both the things of the outside world and the things pertaining to himself. In the schizophrenic form of dementia praecox we find people who practically abandon all concern as to their relations with the outside world, and they ignore them, and regardless of whether the outside world is beneficially or otherwise affecting their conduct they pay no attention to it, [fol. 92] and the result is that they ignore the reaction of their behavior toward the outside world upon themselves, and we also find in our schizophrenic people a very strong tendency to illusions of persecution. They are put upon,

and people are conspiring against them, and that entirely without cause, of course.

Q. Doctor, did you ever have occasion to examine personally the plaintiff in this case, Mr. Galloway, who is sitting here now around the court-room?

A. Yes, sir, I have examined him.

Q. Will you tell the jury what he is suffering from, in your opinion, Doctor?

Mr. Dillon: Doctor, would you mind telling the date of your examination?

Mr. Gerlack: Yes.

A. I have examined him several times. He was examined at my office first some weeks ago. I don't recall the exact date.

Q. Fairly recently, however?

A. Yes, fairly recently, and I examined him the last time at his own residence some three or four evenings ago.

Q. Just tell us, Doctor, what you found, on your examination, him to be suffering from?

A. I think it is a schizophrenic branch or form of praecox.

Q. Of dementia praecox?

A. Of dementia praecox, yes, sir.

Q. Doctor, at the present time, in your opinion, is the man sane or insane?

A. He is insane.

[fol. 93] Q. Now, let me ask you this, Doctor: Do you think if we called him to the witness stand that his condition is such that he would be of any help to us in eliciting the facts in this case?

A. I don't think that you could depend upon what he told you.

Q. You don't believe the man has the mentality enough to be a witness?

A. I think the type of disability that I described that makes him perfectly disregardful of what he does, so he doesn't understand the impact of the outside world on his interests or any interest of any kind, he is likely to tell you anything.

Q. Doctor, you have been sitting here in court and you have heard the testimony up to this point?

A. Yes, sir.

Q. Now, Doctor, take the deposition, for instance, of John J. O'Neill, his chum. You heard the deposition read, that he was his chum, born in the same neighborhood, raised with him and chummed with him?

A. Yes.

Q. I want to ask you particularly, Doctor, what effect, in your opinion, this observation Mr. O'Neill made in 1919 has to do with Mr. Galloway's present mental condition, as to whether or not in your opinion, these are or are not symptoms of insanity at that time—I am reading on page 5 of the deposition:

"Q. And what did you observe about his condition, physical and mental, at that time?"

[fol. 94] This is referring to April and May of 1919, when he first came back.

"A. He was a wreck compared to what he was when he went away. The fellow's mind was evidently unbalanced.

"Q. When was that, Mr. O'Neil?

"A. That would be in April or May, 1919.

"Q. Well, what kind of clothes was he wearing at that time?

"A. He was wearing a uniform and he had some kind of a decoration from the division that he was in, I think the Third Division. I am not sure about that."

What effect—it appeared in the deposition that he was as neat as a pin, nothing observed by this chum of anything mentally wrong with him before he went in the Army, and then we have this observation immediately after he came out. What effect has that observation of Mr. Galloway upon his present disease?

A. Well, that is a manifestation of what I said. He had lost his interest in the effect of the outside world on himself, the effect he produced on other people by his slovenly dress and conduct.

Q. I will read on further:

"Q. Just tell us what you observed principally about him in April or May, 1919?

"A. Well, he would get off in a corner by himself and he would get like crying spells. Another time you would [fol. 95] meet him and he would appear to be all right. He would talk sensible, the same as anybody else would maybe

the next day or for a couple of days, and then he would go off and wander again with a lot of nonsensical talk. For instance, you would be talking to him and we would try to cheer him up, and one thing and another, and there would be a couple of fellows across the street that would do anything for him, good friends of his, and he would be talking about them, that they wanted to beat him up when they got a chance, and that kind of nonsense.

"Q. When was that?

"A. That was when he came out in 1919, I would say around April or May.

"Q. Now, tell us what else you observed about him.

"A. I have seen him, I don't know how many times he would walk over to the curb and spit blood and he would say, 'There is that f-ing gas.' "

Spitting of blood, would have nothing to do with mentality, would it? Would that come from a man being gassed?

A. It came from an irritation of the lungs.

Q. Nothing to do with his mind?

A. No, sir.

Q. Doctor, what effect would this observation:

"For instance, you would be talking to him and we would try to cheer him up, and one thing and another, and there would be a couple of fellows across the street that would do anything for him, good friends of his, and he [fol. 96] would be talking about them, that they wanted to beat him up when they got a chance, and that kind of nonsense"——

what connection would that have with this disease of dementia praecox?

A. That is an example of what I said, a tendency to delusions of persecution. That is exactly the same thing as when I asked him in my personal conversation with him why he didn't work and support himself now, as he must work, he replied, "All these fellows are down on me and won't give me a job."

Q. Doctor, is that part of the routine examination in a mental case, to see if a man has ideas of persecution?

A. Yes, but if you are examining a man, for example, in the maniacal fits of maniac depression you wouldn't, you wouldn't waste time doing that.

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Mr. Gerlack:

Q. Well, this witness noticed a change of personality, didn't he?

A. Yes. He didn't call it that, but he noticed just what I said, that the man had abandoned all interest in his relations with the outside world, was thinking only about himself. We, all of us, are subject to ups and downs. Some of us would like to swear sometimes at people, but apparently we contain ourselves because of our constant realization of the effect upon the outer world and the outer world's effect upon us. But this man's personality was changed [fol. 97] so that he devoted all his thoughts to himself, indifference to everything. If I could refer to his conduct in the court-room as I observed him here, paying no attention to a matter of the utmost importance ot him, gazing at his feet, twiddling his thumbs, and not concerned with anything. Part of the picture of a lack of reason disqualifies him for any common employment. I asked him why he kept losing his jobs, "Why", he says, "They give me orders and I won't take orders from anybody, and I just quit."

Q. Do you usually find that sort of thing in dementia praecox?

A. Dementia praecox cases are incapable of continuous employment.

Q. Doctor, here is another extract from this deposition:

"How often did you see him during 1919?

"A. Every day. I worked right in the same neighborhood for the John Baizley Iron Works, which is only about two squares from there, 514 South Delaware Avenue, Philadelphia. That firm isn't in existence. I saw him every day, and more so over the weekends, of course, when I wouldn't be working, and over the weekends and Sundays.

"Q. Were you chumming together in 1919?

"A. Yes, sir; we were so thick, and I thought staying around him and people talking to him would try to get him out of his mood, and evidently when he would have one of his good days somebody had told him how he acted at times. [fol. 98] I walked into a store he was sitting in at 604 South Front Street, and he was sitting in the back room crying.

"Q. When was that, Mr. O'Neil?

"A. In the early part of 1919, after he was home a couple of months.

"Q. What was he crying about?

"A. That is what I asked him. He was sitting there crying and I said, 'What is the matter, Joe?' and he said, 'God damn it, I must be a Doctor Jekyl and Mr. Hyde.' "

Would that have any significance, Doctor, in the diagnosis of dementia praecox?

A. I think it is evident—I have read O'Neill's deposition—that he was apparently normal up to the time he went to France, and he began to be subjected to the strain of military life, then he began to go to pieces. Your dementia praecox is based upon an inborn fragility of the mental—like a badly-built house. It appears to be in fine shape and you put your O. K. on it, and along comes a big wind or earthquake and cracks open up and the plaster falls down. Take a normal man. You can stick him in diversity, you can put him in the hardest kind of strains, and you will not drive him insane, but in these praecox cases they are born with an inherent instability, and the result was that when he was put on a big strain, he cracked.

[fol. 99] Q. Doctor, is it reasonable to assume that if he had not been put under a great strain he might have gone through life without cracking?

A. Yes, and if you would pick out any prisoner in the Asylum that I have observed in the last twenty years and put him through the same mill, he would have reacted about the same way. Of course, this man, in the spring of '19, he was still suffering from the acuteness of the breakdown, and he had somewhat longer spells, and gradually more emotional disturbances over longer periods than he does now. He has these little spells that he believes he is persecuted, he has spells of flaring up and becoming angry.

Q. You mean by that he is more deteriorated?

A. He is going down hill still, but the thing began with the breakdown—possibly the crude conditions of military life, the crossing over in the "Aquatania", something of that kind, you can't tell. His conduct was something that no man who hasn't lost his regard for the outside world's impact upon him is going to do, to black their officers' eyes, and curse them, and so forth.

Q. Doctor, I am not going to take the time of going over all these depositions. You heard them all read?

A. Yes, I heard them read.

Q. Take, for instance, the episode when they were on the firing line on the banks of the Marne, with the Germans on the other side, when Mr. Tanikawa, who was in the squad [fol. 100] with Mr. Galloway, said about midnight—Tanikawa said he was about twenty feet from him, and although he was on guard also, didn't see any Germans coming, about midnight all at once Mr. Galloway yelled out, "The Germans are coming, the Germans are coming." I think you can assume they weren't coming, because Mr. Tanikawa said he didn't see them, and they didn't find any Germans. Would that have any significance from the standpoint of his present diagnosis of dementia praecox?

A. It is an extreme example of the emotional instability, as I have emphasized, is part of the picture. He blew up under a strain that did not blow anybody else up on the same squad, and on the same duty.

• • • • • • •

Mr. Gerlack:

Q. Doctor, do you remember the deposition of the Lieutenant-Colonel Chaplain?

A. Yes, sir.

Q. What significance has his testimony there? I am not referring so much to his conclusion when he said the man was irrational, but the man was not interested in his surroundings.

A. That is the case I was trying to think of when I said there was another example in the deposition of delusions of persecution. He would constantly come out of this depressed stage and complain because he thought he wasn't getting a fair deal in the type of discharge they gave him.

Q. I notice this on page 5 of Lieutenant Colonel Mathews' deposition, the Chaplain of the United States Army:

[fol. 101] "With reference to Private Galloway, state what if anything you noticed about that man with respect to any interest or lack of interest in his surroundings.

"A. He seemed to have no interest and showed no interest in Army Life in general, he was confined both as patient and prisoner. He manifested no interest in anything outside of his own claim. He acted as one who is identified as an egocentric.

"Q. State what, if anything, you noticed with reference to his failure or lack of attention and concentration?

"A. Only that it was extremely difficult to divert this soldier from that which I identified as a monomania, in that he couldn't apparently concentrate on any other subject which I would introduce for discussion."

What significance would that observation have?

A. Exactly what I said, again. When a fellow loses all interest in the outside world and thinks only about himself and the things he thinks affect himself, obviously a limited field of interest, his mind fails.

Q. Here is another one:

"What was the occasion of his excitement?

"A. His apparent feeling that he was being mistreated to the point of martyrdom; this without any justification in fact."

A. That is what I said, delusions of persecution. That was his second enlistment in 1921. That is the persecution [fol. 102] part of dementia praecox that makes some of them so dangerous in the homicidal forms, because they are defending themselves against the delusions that someone is going to hurt them.

Q. Doctor, I am going to assume, for the sake of this question—it is a hypothetical question—I am assuming they are facts—I might say this has not been introduced in evidence yet, but for the purpose of my hypothetical question I will assume it is in evidence, and if it is not received in evidence I will ask it be stricken later—in the deposition of Lieutenant Colonel James E. Mathews——

* * * * * * *

Mr. Gerlack: * * *

"Prior to his transfer what do you remember about his service?

"A. Galloway was a man of medium height, about 5 feet, 5 inches, with blue eyes, brown hair, ruddy complexion, was not very large, probably 140 pounds. He impresed me as a man who had seen considerable prior service. I either made him a corporal or at one time intended to, because of his ability to handle men, and of his familiarity with military accomplishments. I found it necessary, however, to discipline Galloway and reached the conclusion that he was not to be depended upon.

"Q. What do you recall as to this man's personal con-
[fol. 103] duct—moral, immoral—and his behavior—disorderly?

"A. He was a man that drank considerably, apparently, and was at that time what we called a Bolshevik. Did not seem to be loyal and acted as if he was not getting a square deal. In my opinion, I thought at that time he was a moral pervert and probably used narcotics. He was one of three men in my entire experience that I could not appeal to. I decided that he was not a desirable soldier, but I could not get enough on him to have him tried and awarded a dishonorable discharge. I remember, however, that he was tried at least one time while I commanded that company."

Q. Basing your opinion on these hypothetical facts, assuming these facts for the purpose of the question to be true, what, if anything, would that description of him, so far as the present dementia praecox is concerned, indicate?

A. Well, his lack of interest in anything military or otherwise ties in perfectly with what I have been saying here.

Q. It is all part of the same picture?

A. It is all part of the same picture.

Q. Now what would you say as to a dementia praecox case suffering with the degree of severity of Mr. Galloway, so far as dependability is concerned, whether or not they are dependable?

A. Oh, no, not at all, not at all; no, sir.

Q. You say they are not dependable.

[fol. 104] "You stated something about suspecting this man of being a moral pervert, of using narcotics. What if anything, developed in connection with either of these suspicions on your part?

"A. I have had on more than one occasion confirmed dope fiends in my outfit, and it has been my experience that it is extremely difficult to catch them. I suspected this man Galloway and his partner, a man by the name of Murray, as being addicted to the use of dope, and instructed the first sergeant and other non-commissioned officers of the company to search his effects to see if we could not find the evidence. He was an older man than many of the men in my company and I feared his influence. I never was able to establish proof to the effect that he was addicted to the use of drugs."

Q. Doctor, is there any connection between the actions of a drug addict and a dementia praecox?

A. Well, the two things are not exclusive. A dementia praecox might be led into using drugs.

Q. Well, have you had experience in treating and examining addicts in your lifetime?

A. Oh, yes.

Q. Is that part of your business?

A. Well, I have had to do so more or less as a matter of testifying.

Q. That is in the Superior Court of Sacramento County, here?

[fol. 105] A. For the various counties, yes, sir.

Q. In your opinion is Mr. Galloway addicted to the use of drugs?

A. I have nothing to hang an opinion on. There is one deposition—I don't want to say which deposition it is in—about something—I think it is in the one you are reading—I haven't the data—that excludes the drugs.

Q. Well, this mentions drugs and says they were unable to prove anything on it. But so far as the examination goes, did you see anything to indicate to you as a doctor that Mr. Galloway at the present time is addicted to the use of drugs?

A. He isn't at the present time, no, and I will tell you why——

Q. Is there anything to indicate he ever was, as far as your examination goes?

A. I can't say as to that, but if an ordinary private in the ranks used drugs, he would use two types, morphine and cocaine. He isn't going to get the more elaborate drug store drugs. Now, the morphine would act upon the pupils of his eyes. At the present time the pupils of his eyes react perfectly normal. I tested them on two occasions. And cocaine taken, unless you put it into a man's eyes, doesn't have any effect at all, taking it as they usually do, by snuffing it, it has no effect on the eyes, so there is nothing at all in the present condition to suggest he is using drugs at the present time.

Q. If a man becomes afflicted as a drug addict he usually carries it out as long as he lives?

[fol. 106] A. It is a matter of association. You can take the drug away from a man—I have had occasion to do it on

many occasions—take the drug away from a man and keep it away from him until he gets clear of it, then it is the mere fact of association, getting with other fellows using it that causes them to use it again.

Q. "During this period of service which Joseph Galloway was under your command of Company A, 20th Infantry, did you have occasion to see him or observe him more or less frequently, or only occasionally?

"A. No, I observed him every day. Several times every day. I was the only officer with the company most of this time and was responsible for its drill, its administration, and during part of this time, was in camp with this man and on the target range. I observed him considerably more in this period of service than normally an officer would observe an enlisted man.

"Q. How large were your organizations at that time?

"A. In the National Defense Act of 1920 they recruited the organizations up, or attempted to, and at this time we had something like 60 men in a company, as I remember it."

Mr. Dillon: If your Honor please, if counsel is going to read the deposition in this way I would request that the whole deposition be read.

Mr. Gerlack: Of course, if the Court is prepared to allow [fol. 107] it to be read, there are other parts I desire to call the attention of the doctor to.

The Court: If you wish you can read it now.

Mr. Gerlack: Very well, your Honor.

Mr. Dillon: Introduce it on behalf of the plaintiff?

Mr. Gerlack: No, you said you wanted it in behalf of the Government.

Mr. Dillon: No, you are using it.

Mr. Gerlack: It is immaterial. Let me have the original, Mr. Clerk.

This is the deposition of James E. Matthews, it is Lieutenant Colonel James E. Matthews. This man spells his name M-a-t-t-h-e-w-s.

Mr. Dillon: I think the doctor better step down while you read the deposition.

Mr. Gerlack: Yes. I will occupy the chair, Doctor.

This deposition was taken on behalf of the Government on April 29, 1941, in the office of the Selective Service, Lumpkin County Court-house, Dahlonega, Georgia. The

Government was represented by Richard N. Ivins, Chattanooga, Tennessee, and the plaintiff by Sam S. Harben, Gainesville, Georgia.

"The witness, Lt. Col. James E. Matthews, first being duly sworn, deposes as follows:

"On Direct examination.

"By Richard N. Ivins:

"Q. Give name and work.

"A. James E. Matthews, Dahlonega, Georgia, Regular [fol. 108] Army Officer, United States Army.

"Q. Are you a graduate of West Point?

"A. No.

"Q. How long have you been a regular army officer?

"A. Since July 1, 1920.

"Q. Prior to that time were you an officer holding an emergency commission?

"A. Yes.

"Q. How long did you hold this emergency commission?

"A. I served through the period of the World War with commissioned rank from August 15, 1917 to November 1, 1919.

"Q. What is your present assignment?

"A. Professor of Military Science and Tactics, North Georgia College, Dahlonega, Georgia.

"Q. This is a suit seeking to recover on war risk insurance contract issued one Joseph Galloway, during his World War service. Did you know Galloway?

"A. Yes.

"Q. I wish you would state briefly the circumstances and the place or places when you became acquainted with Galloway.

"A. Joseph Galloway was an enlisted man in Company A, 20th Infantry, which I commanded during the period of the first part of the year 1921. I can't recall just exactly when he came to the company, whether he was in it when I took command or came shortly thereafter. I took command in the fall of 1920.

"Q. I have here certified army service and medical rec- [fol. 109] ords pertaining to Joseph Galloway. I wonder if you care to refresh your recollections.

"A. Yes, I would.

"Q. Col. Matthews, having refreshed your recollection from these photostatic copies, will you continue with your statements.

"A. During the summer of 1921, while we were on the target range at Camp Bullis, we received orders to transfer certain men to the 29th Infantry at Fort Benning, Georgia. Joseph Galloway was among those transferred in compliance with this order.

"Q. Prior to his transfer, what do you remember about his service?

"A. Galloway was a man of medium height, about five feet, five inches, with blue eyes, brown hair, ruddy complexion, was not very large, probably 140 pounds. He impressed me as a man who had seen considerable prior service. I either made him a corporal or at one time intended to because of his ability to handle men and of his familiarity with military accomplishments. I found it necessary, however, to discipline Galloway and reached the conclusion that he was not to be depended upon.

"Q. What do you recall as to this man's personal conduct —moral, immoral—and his behavior—disorderly?

"A. He was a man that drank considerably, apparently, and was at that time what we called a bolshevik. Did not seem to be loyal and acted as if he was not getting a square deal. In my opinion, I thought at that time he was a moral [fol. 110] pervert and probably used narcotics. He was one of three men in my entire experience that I could not appeal to. I decided that he was not a desirable soldier, but I could not get enough on him to have him tried and awarded a dishonorable discharge. I remember, however, that he was tried at least one time while I commanded that company.

"Q. I refer you to the page which is marked 6g and also in blue pencil and P. 60 of the certified A. G. O. records which you have already examined and ask you if this is a record of that court martial.

"A. It is.

"Q. Please read that into the record and tell us what it means in lay language.

* * * * * * *

"A. 'Record of conviction by Court Martial. Summary Court Martial appointed by General Dickman. 96 Articles of War. Appearance upon the streets drunk and dis-

orderly. Stands approved. To be confined at hard labor for one months and to forfeit two-thirds of his pay for a like period. Approved January 24, 1921.'

'I certify the above is correct: James E. Matthews, 1st Lt., 20th Inf., Commander Company A, 20th Inf.'

"Q. Are you the same person?

"A. I am the same person. This is my signature.

"Q. Are there any other quotations relative to court martial?

"A. Yes, this is followed by record of another trial by [fol. 111] another person in another situation. There is nothing further regarding me.

"Q. Do you recall what became of this man—whether he faced this sentence and whether he returned to your organization?

"A. He completed this sentence and was returned to my organization.

"Q. Did he do duty with your organization until you transferred him to Camp Benning?

"A. He did—after completing the court martial.

"Q. You stated something about suspecting this man of being a moral pervert, of using narcotics. What if anything developed in connection with either of these suspicions on your part?

"A. I have had on more than one occasion confirmed dope fiends in my outfit, and it has been my experience that it is extremely difficult to catch them. I suspected this man Galloway and his partner, a man by the name of Murray, as being addicted to the use of dope, and instructed the 1st Sergeant and other non-commissioned officers of the company to search his effects to see if we could not find the evidence. He was an older man than many of the men in my company and I feared his influence. I never was able to establish proof to the effect that he was addicted to the use of drugs.

"Q. Who was 1st Sergeant of this organization?

"A. Earl Shipp.

"Q. I believe that you stated that this was Company A, 20th Inf.?

[fol. 112] "A. Yes.

"Q. During this period of service which Joseph Galloway was under your command of Company A, 20th Inf.,

did you have occasion to see him or observe him more or less frequently or only occasionally?

"A. No, I observed him every day. Several times every day. I was the only officer with the company most of this time and was responsible for its drill, its administration, and during part of this time was in camp with this man and on the target range. I observed him considerably more in this period of service than normally an officer would observe an enlisted man.

"Q. How large were your organizations at that time?

"A. In the National Defense Act of 1920 they recruited the organizations up, or attempted to, and at this time we had something like sixty men in a company, as I remember it.

"Q. Were you in command of this company without any other officer during the entire period Joseph Galloway served with the company?

"A. Practically throughout the period.

"Q. In this association and frequency which you describe, did you have an opportunity to form any opinion as to whether Joseph Galloway was a sane or an insane man?

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"A. It never occurred to me at that time to question his sanity. While I am not an expert on sanity, of course, his actions were not such as I would judge an insane man's [fol. 113] to be. He was a rather unusual character in that he had these periods of gayety and exhileration, seeming to have a great deal of pep which I attributed to the use of liquor or drugs. At other times he appeared to be depressed as if he had a hangover. As I remember the case and observing him today under the same conditions, after these additional years of experience, I do not believe I would conclude he was suffering from insanity.

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"Q. You just stated that you attributed these periods of elation and other periods of when there would apparently be a letdown etc., to the use of alcohol or narcotics. You have already told us about the investigations made in connection with narcotics and you have also testified relative to the Summary Court Martial occasioned when he was charged and convicted. Do you recall when and where on any other occasions he was using alcohol while he was under your command?

"A. As I remember it, there were other times when it was thought that the man smelled of liquor. Other times apparently during these periods when his conduct was unusual, but we could not smell anything. That is the reason why I thought it must be dope.

"Q. Did you state awhile ago the length of time he served under you?

"A. I do not remember when he came. I know I served from some time in December to June 30, but I can't remem- [fol. 114] ber just exactly when he came, whether he was in it when I took command or not.

"Q. You stated that you finally transferred him out of your organization to Camp Benning. What was the reason for that?

"A. The reason for transferring Galloway was that we were required to transfer a large number of men to the 29th Infantry at Fort Benning which was being recruited to war strength to be used in demonstration in connection with the Infantry School and therefore needed the men worse than we did. I recall perfectly well the question of giving this man a character.

"Q. That is your name on the transfer papers?

"A. Yes. I gave him 'very good' after much reluctance. The grades of character in the army are 'excellent', 'very good', and 'good', in sequence. I thought I ought to give the man a lower rating in character.

"Q. Why?

"A. Because of his conduct but in the army it is not customary to reenlist a man with character less than 'very good', and I hesitated to cause this man to loss all prior service strictly on my judgment and preferred to give him a chance under another company commander.

"Q. The Summary Court Martial does not, as I understand it, require any particular type of discharge? Is that correct?

"A. No. A general court will specify dishonorable discharge as part of the punishment. It is not within the power of any army officer to charge the dishonorable dis- [fol. 115] charge. The regulations provide that. There is a regulation, however, that a man may be discharged under Par. 148½ Army Regulations as being undesirable which gives a discharge without honor—being neither honorable nor dishonorable. That regulation did not exist at that time or I would have used this method in attempting

to rid the service of this man. There was a regulation that a certain number of Summary Court Martials within a given length of time, one year, warrants placing the man before a General Court for the purpose of having him dishonorably discharged from the service on the basis of being a repeating offender. I have always been extreme in my attempts to give every enlisted man the benefit of every doubt, and have consequently taken much more off of some enlisted men than the average officer would take, always hoping that I could save him for himself and the service.

"Q. And I take it after you decided to transfer this man under these conditions you had no further connection or observation of him?

"A. That was the last. I never knew what became of him. I did get a letter from his wife later to the effect that if I remember the man, etc.

"Q. Was that in recent years?

"A. It must have been about 1933.

"Q. Do you have any interest about the outcome of this case?

"A. None whatsoever. I would like to see the man get justice and the government get justice.

[Fol. 116] "On Cross-examination.

"By Sam S. Harben:

"Q. As Joseph Galloway's sworn record shows that he enlisted in the army November 1, 1917, and was honorably discharged April 29, 1919, you do not know anything about him or his military record during that period, do you?

"A. No. Nothing at all.

"Q. At the time of his discharge, May 29, 1919, you know nothing of his mental or physical condition?

"A. No.

"Q. During the time that Mr. Galloway was under your command in 1921, you stated that you called him what was termed a Bolshevik. What do you mean by that?

"A. Well, that was a rather common expression at that time gotten from the Russian Revolution. It simply meant in the army that we considered the man a type that would create a disturbance and try to influence men in the company to complain and be dissatisfied with conditions.

"Q. I will ask you if Galloway thought he was being mistreated and abused.

"A. I believe that Galloway thought he ought to rate more than he did in the company. In other words, I had the idea that Galloway thought he ought to be a non-commissioned officer.

"Q. Did he seem to think he was not being treated fairly?

"A. That was my opinion.

"Q. Did he seem to have any interest in his work?

"A. Yes. At times he was one of the very best soldiers I had.

[fol. 117] "Q. What about other times?

"A. At other times I could not depend on him. He would be absent from reveille, for instance.

"Q. He had alternate periods of interest and disinterest?

"A. Yes.

"Q. What would you say his general attitude was?

"A. At first it seemed to be good—later on bad. I attributed it to the fact he was sore because he was not promoted.

"Q. However, that is your opinion?

"A. That is right.

"Q. Was it your opinion at that time that there was something wrong with him?

"A. It was my opinion that he was doping or drinking to excess. It never occurred to me to question his sanity.

"Q. But that opinion was never confirmed?

"A. At times the drinking was confirmed and the other times I could have tried him but hoped to reclaim him and never did.

"Q. I believe you had some communication with this man's wife about 1933?

"A. If I am not mistaken, I wrote to her twice.

"Q. Didn't you tell her that Galloway did not react as a normal man?

"A. Yes, I did.

"Q. Will you please state what you meant by that?

"A. There were times he did not act right himself.

"Q. Then there were times when he was not drunk or [fol. 118] not using dope when he did not appear to be normal?

"A. That is right.

"Q. In talking to him did he ever talk incoherently?

"A. As I remember it, he would talk incoherently at times.

"Q. Were some of those times when he would not be drunk?

"A. I could not say that. I think that it was the period that I tried him for drinking and I could not swear as to other times. I think there were other times, but I could not swear to it.

"Q. Did he have alternate periods of melancholy and at other times be all right?

"A. He would alternate periods of excessive cheerfulness and rather lifelessness.

"Q. Would you say that he had periods when he seemed to be depressed?

"A. Yes, I think there were times when he thought the world was not treating him right.

"Q. At other times he would be excessively cheerful?

"A. In other words he would be a very bright man.

"Q. Did you notice at any time that he appeared to resent orders or commands given?

"A. No, not in my presence. He would have had to be pretty drunk to follow that attitude in the presence of an officer. He obeyed more cheerfully at times than at others.

"Q. What about his getting on with fellow soldiers?

"A. Very well.

[fol. 119] "Q. Did that alternate or not?

"A. Well, they seeemd to like the man. He was older than they were and it got to the point I considered him a bad influence in the company.

"Q. By that, were there periods when he did not get along so well?

"A. I do not recall that he did not get along with men. The men were afraid of him.

"Q. Did you have any complaints of that sort?

"A. Not particularly. In other words, he gave the impression he would fight pretty easily. They did not fool with him much.

"Q. Would you say that he was reliable or unreliable?

"A. At first I considered him reliable and later on I considered him very unreliable.

"Q. You stated awhile ago that you were suspicious he was using dope. You never found anything to confirm this suspicion?

"A. No.

"Q. In that connection you did have his bag searched by your men but never found any?

"A. No. I did not make a habit of having his equipment searched, but I remember at least one occasion.

"Q. Now, during these alternate periods you have just discussed when he would not be reliable and dependent, I believe you stated that you examined him and found no trace of whisky on his breath?

[fol. 120] "A. Normally I did not come in close enough contact with the man to be trying to smell his breath myself, but I remember having a consultation with my non-commissioned officers and took up his case to see if we could not do something about it. Some of them reported at times they could smell it and some they could not. I remember when we had his equipment searched he acted so different from a normal man. He seemed to be out without any special reason.

"Q. Then you noticed there were periods when you noticed something wrong with him for which you could attribute no cause?

"A. Yes.

"Q. In what way would you notice something wrong with him?

"A. He acted just like I had noticed other men that I know to be addicts to drugs.

"Q. Can you describe his actions?

"A. The pupils of his eyes appeared to be dilated. He normally was bright and intelligent, and when you would question him he would not answer the same way.

"Q. You mean his actions were not those of a normal man?

"A. Yes. That is in comparison with other days.

"Q. And you were not able to find anything to cause that?

"A. That's right.

"Q. What about his physical side? Did he appear to be able to do his work?

"A. Yes.

"Q. Did he ever appear to be exhausted or not able to work?

[fol. 121] "A. At one or more times that I considered he was under the influence of drugs or liquor, I remember he was not able to do his duty.

"Q. I believe you say that you remember this man quite vividly?

"A. Yes, I do.

"Q. Do you state that he was one of three men with whom you have had experience that you were not able to do anything with?

"A. Yes, one of three I considered someone else would have to do something for. I could not help him.

"Q. You expressed the opinion that this man was not insane. What do you mean by insane? Do you mean violently insane or just what do you mean?

"A. As I stated, I am not an expert on insanity. I have been around some insane persons and have had to on one or more occasions be responsible for persons who were violently insane, and from what experience I have had from insanity, he just did not have the actions of these insane persons with whom I am familiar.

"Q. And those whom you speak of as being familiar with were more or less violent?

"A. That is right.

"Q. You do not mean to say he was not suffering from some mild disorder?

"A. No.

"Q. You are not taking into consideration the various degrees of insanity?

[fol. 122] "A. No.

"Q. But you merely mean to state he was not violently insane?

The following examination by Mr. Ivins:

"Mr. Ivins: Either I or you misunderstood the last question. I understand you to say on direct examination that this man appeared to be normal mentally. Will you please explain your answer given to the last question asked?

"A. What I mean by that is the insanity which I knew was probably the violent type, and I certainly did not notice the characteristics of an insane man as I knew them. And the question as to the degree of insanity, I could not judge about that unless I was a judge of insanity. I did not consider the man insane in any respect.

"Q. You had this man in close order drill, physical exercises, setting up exercises?

"A. Yes.

"Q. Is much or little coordination required in these exercises?

"A. There is a very high degree of coordination required.

"Q. How did this man respond to commands to coordination and obedience?

"A. Very well.

"Q. Did you have any trouble with him on any occasion? If so, tell us about it—in the course of drill, guard duty, physical drill, target range, or the other types and character work, that you had him perform under your command, aside from these instances that you have already told us about.

[fol. 123] "A. No other trouble that I remember.

"Q. About his talking coherently or incoherently. When did you say that occurred?

"A. I remember having him in the orderly room. There was one morning at reveille that he could not make the grade. Everybody in the company thought it was because he had been drinking to excess or under the influence of drugs.

"Q. By not making reveille, do you mean he was not out?

"A. Yes. The first sergeant could not get him up. Later on in the day he was all right.

"Q. Is there any other occasion when you considered his speech incoherent?

"A. No, if there was any other occasion that came up of that kind, I can't remember specific occasions, except when I probably tried him for being drunk.

"Q. And on the occasions which you stated that you did not smell whiskey on his breath, that he would act as if he was more or less let down, do you know whether he had been drunk or been taking narcotics on those occasions, aside from the fact that narcotics were not found on him? Can you give any definite opinion as to the cause of those periods?

"A. Well, what we thought at that time was that this soldier was just on the borderline. He was too smart for us to catch. We figured these spells were results of hangovers and misconduct in that way.

"Q. I take it you have had no personal experience as to [fol. 124] the exhileration of alcohol, but you probably have observed. Is that characteristic?

"A. Yes, from my observation and experience.

"On Direct examination.

"By Mr. Harben:

"Q. You can't say that these alternate periods were not caused by some mental trouble?

"A. I could not say that.

"Q. There were occasions when he appeared not to be mentally all right which you could not explain?

"A. That is right.

"Q. On this particular occasion which he did not respond to reveille. That was not explained, was it?

"A. The first sergeant reported that he sent in to get these men out, Murray and Galloway, and said he could not get them out and wanted to report the fact to me. As I remember it, I sent for them after I came down to drill after breakfast, and they were up and acted like they had a hangover. We did not require bed-check at that time and they said they were out late and slept through reveille.

"Q. Were any charges preferred?

"A. No."

Dr. E. M. Wilder resumed the witness stand.

Direct examination (Resumed):

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Mr. Gerlack: I might say, your Honor, counsel has [fol. 125] handed me from the Government's file the Veterans' Administration Medical Examinations of Mr. Galloway, and I think your Honor knows the rule that has been pretty well established in all the Circuits, that parts of these examinations are inadmissible, and for that reason the procedure is to mark them for identification and each side read the admissible parts.

The Court: Very well.

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Mr. Gerlack: * * * Next is 1-C.

(Wassermann Report dated 1-14-30 was marked "Plaintiff's Exhibit 1-C for Identification.")

Mr. Gerlack: It appears to be Clinical Laboratory, United States Veterans' Bureau, San Francisco, California, Wasserman Report, 1-14-30. "Ice box, Negative. Water Bath, Negative. Kahn Precipitation, Negative."

Q. That means the man didn't have syphilis, Doctor?

A. It didn't show, yes, sir.

Q. Doctor, will you explain in any kind of examination such as this why they always take a routine Wasserman test?

A. In syphilis the cerebro-spinal system shows a definite set of symptoms, and if it progresses far enough a definite type of insanity.

Q. But this is not that?

A. This is not that, no, sir.

Q. Am I correct, Doctor, as I understand in the diagnosis of the medical profession you rule out certain things until you narrow it down to the thing which is the——

[fol. 126] A. Sometimes you don't do it that way. If it is a diagnosis by exclusion, when you say it is not this and the other thing, there is only one thing left—that is diagnosis by exclusion.

Mr. Gerlack: The next is Report of Physical Examination by the United States Veterans Bureau at San Francisco, California, May 19, 1930.

(The document referred to was marked "Plaintiff's Exhibit 1-D for Identification.")

Mr. Gerlack: The examination of the lungs, pulmonary fiberic, moderate—what does that mean, Doctor?

A. Means there has been in the past a sufficient amount of inflammation in the lungs, here, that was healed—whether it be from tuberculosis or irritation of gas or what-not—that it has formed a certain amount of fibrous tissue like you find in any scars.

Q. Could that come from breathing in military gases on the field?

A. Yes.

Q. Passing on to the conclusion: "General diagnosis (based on entire physical condition): 1. Pulmonary Fibro-

sis, Moderate; 2. Otitis media, chronic"—what does that mean?

A. Chronic irritation of the middle ear.

Q. "Hypertension, arterial, mild"—what is that?

A. Mild degree of hypertension.

Q. "Moron, low grade; observation, dementia praecox, simple type." What does that mean?

[fol. 127] A. It classifies him as a man of limited mentality, low grade moron at that, and recommending he be observed further for diagnosis of dementia praecox.

Mr. Gerlack: The next is—what is that, 1-E?

(Wassermann Report dated 5-21-30 was marked "Plaintiff's Exhibit 1-E for Identification.")

Mr. Gerlack: Seems to be another laboratory test for Wassermann. "Ice Box, Negative; Water Bath, Negative; Kahn Precipitation, Negative." Those are the prescribed tests for syphilis, are they, Doctor?

A. Yes, sir, some of them.

Mr. Gerlack: The last one is Report of Neuropsychiatric Examination. This is at the Palo Alto Hospital of the Veterans Administration at Palo Alto, California.

(The document was marked "Plaintiff's Exhibit 1-F for Identification.")

Mr. Gerlack: I might say, your Honor, a lot of this is history, which is inadmissible, and I have to run over this.

Mr. Dillon: What is the date of that, Mr. Gerlack, please?

Mr. Gerlack: November 16, 1931.

"It is practically impossible to get any definite information from patient."—My recollection is a complaint is also inadmissible.

Mr. Dillon: Yes.

Mr. Gerlack: "Physical Examination: Patient is below the normal in height, fairly well developed and nourished, age 34. Height 65½ inches; Weight, 140 pounds. Skin is [fol. 128] normal in color and consistency. Slight scar bridge of nose and right cheek. Tattoo right and left forearm. Hair brown,"—and so forth and so on.

"Neurological Examination"—Doctor, will you explain to the jury the difference between a neurological examination and a neuropsychiatric examination?

A. Well, a neurological examination has to do with the way in which the nerves are doing their work, in carrying

impulses to and from the central nervous system, while the psychiatric part of it has to do with the way the brain, itself, is working.

Mr. Gerlack: "Neurological Examination: Pupils are equal, regular and react to light and accommodation. Ocular movements normal. Slight tremor of protruded tongue. Otherwise motor cranial nerves are intact."

Q. Does a slight tremor of protruded tongue mean anything in this case?

A. Not in this case.

Mr. Gerlack: "Tremor of extended figures. No atrophies, paralysis or hypertrophies. There is impairment of sensation on right side. Vibratory sense normal. The right facial muscles are weak. The right hand grip is slightly weaker than the left. He is right handed. Romberg is positive. Loses his base going backward and at times somewhat to the right. There is some overlapping in the coordination test of finger to nose and finger to finger equally. Deep reflexes are present and equal. Deep reflexes of lower extremities present and active. Corneal and pharyngeal [fol. 129] reflexes normal. Abdominal and cremasterics are absent. No Babinski or ankle-clonus. There is definite speech defect on test phrases."

Q. Will you tell us in general what does that mean, Doctor, what is the significance of those tests in this case?

A. Well, there are various tests for reactions, like this ordinary knee jerk we are all familiar with.

Q. What does that mean, the knee jerk test?

A. When you hit your knee here (illustrating), regardless of whether you want to hold it or not it is going to jump.

Q. What happens if it doesn't jump?

A. You look in the spine to see if he has syphilis.

Q. If it jumps you are all right?

A. If it jumps you are all right.

Q. How about the Romberg test? It says, "Romberg is positive".

A. The Romberg test is positive. The Romberg test consists of having a man stand on his feet with his eyes shut. If we are normal we can stand still with our eyes shut or open. Some fellows, due to many things, such as syphilis, are unable to stand on their feet because they have lost the

contact of their feet with the ground, which is the thing most of us balance by without thinking.

Q. What other things would cause that besides syphilis?

A. A certain amount of incoordination, certain amount of neurological inexactitude, like the inability to touch your nose or the end of your fingers (illustrating)—I [fol. 130] overlapped it a little, myself—It is evidence of the fact that you haven't complete control of your muscular sense and it is capable of various interpretations.

Q. Could it be cause- by disturbance of the central nervous system?

A. Yes.

Q. The central nervous system, what does that consist of?

A. The central nervous system consists of the brain and spinal cord.

Q. No other nerves in the body are in the central nervous system except the brain and spinal cord?

A. The brain and spinal cord.

Q. Could influenza cause a positive Romberg or a weakness on one side of the face or body, such as indicated here?

A. The poison of influenza has a selective action in producing neuritis of some nerves. I remember that after the influenza in 1918 there were a lot of men thought they had heart disease when they merely had a neuritis of the nerves running around their ribs on the left side, and it produced false reactions, nerve reactions.

Q. Let me ask you this, Doctor, what is the usual course for an ordinary case of influenza, uncomplicated influenza?

A. Oh it depends on the severity of the case. You have to keep a man quiet until his heart comes back normal.

Q. What about the usual time?

A. In the type of epidemic we have been having of late years, we keep the patient a few weeks in bed and a week [fol. 131] quiet around the house.

Q. Did that so-called Spanish influenza we had in 1918 differ from the kind we have today?

A. No, sir, it was no different except that different strains of influenza differ in their violence. That killed a larger number of people, while nowadays we have a small proportion of deaths to cases.

Q. Would you say 101 days in the hospital was an unusual time for a case of influenza?

A. I think so.

Q. Would that indicate to you as a medical man as to whether or not—as far as the influenza is concerned, as to whether or not there was a possible complication?

A. It was in the big epidemic of 1918, it was a very severe epidemic, and the man may have been absolutely prostrated, it may have been necessary to hold him there because of a bad heart or some complication. It doesn't show in the record. Otherwise it was quite unusual.

Q. The rest of the medical examination reads as follows: "Mental Examination"—that is what we are particularly interested in this case in?

A. Yes.

Q. "Patient enters the examiner's office willingly, displaying no particular mannerisms, grimaces, or affectations. He is indifferent, inaccessible, and displays irritability at times. His attention is poor and he volunteers no information. Correctly oriented." That means he knows where he is?

A. Yes.

[fol. 132] Q. "Memory poor for both recent and remote events. Cannot remember dates of entrance or discharge from military service. When questioned about being in the service and deserting in 1922, says he does not remember anything about it. Often, when pressed for an answer or reminded that he said so and so about a certain thing when interviewed previously, will toss his head and say 'I don't remember a damn thing about it.' Frequently appears not to care whether his answers are correct or not and often becomes irritable. School knowledge is most limited. When asked the name of largest river in the United States, says: 'Christ, I don't know.' Cannot name the Great Lakes. Hoover is President and Wilson before him. When asked if he were not mistaken about this, replies: 'Oh, hell, I never vote anyway.'

"Repeats 497 correctly. When asked to repeat it backward, says 749. Will not attempt to repeat four figures. Says 'I can't do it.' 6 times 10 equals 60; 6 times 7 equals 70; 8 times 8—says, 'I did not go to school for that.' Says he does not read the newspapers and therefore knows nothing regarding current event.

"Denies the existence of enemies. Then admits he thought people watched him when he went out alone and for that reason seldom went out unless accompanied by his wife.

Says people call him S. B. when out on the street alone and this causes arguments which may end in a fight. Denies he has ever thought his food was poisoned. Has never felt [fol. 133] electric currents pass through his body. Cannot control the mind of others nor can his mind be controlled by another. Has a paranoid trend toward his mother-in-law. Says she tries to run his business and is constantly after him for not working. She is responsible for his being here.

"When going to the Regional Office just prior to his coming here, had an argument with someone on the street. He was arrested by the police and fined five dollars. Says he was shortly released.

"At first denies hallucinations, then later intimates he heard voices. When closely questioned, says they were only children on the street. It is thought he probably has had auditory hallucinations.

"Emotionally, he is slow, dull, indifferent and decidedly unstable.

"Attention is poor. It is gained without difficulty but difficult to hold.

"Associations are slow and narrow. Train of thought retarded with blocking."

What does that mean, "retarded with blocking"?

A. "Retarded with blocking"?

Q. Yes, "Associations are slow and narrow. Train of thought retarded with blocking."

A. A train of thought is the sequence of ideas in your head and following from one idea to another. It was slow in his case, retarded, and you could easily stop it by inter- [fol. 134] jecting something like drawing a red herring across the trail.

Q. "Psychomotor activity is somewhat lessened at this time." What does that mean?

A. The psychomotor activity is not the muscular but the mental activity in whatever it may be, following up or any other mental effort that requires—well, movement of the mind. It is retarded, it is lessened. He is suffering from some dementia.

Q. Is that part of his picture of dementia praecox?

A. Yes.

Q. "Has no ideas for the future and appears absolutely indifferent to himself and the world in general.

"Since coming here he has adapted himself fairly well to his surroundings. Has frequently—almost daily—asked for something for headache. Wife says he would at times take as much as twelve aspirin tablets daily before coming here.

"Summary: Patient is a fairly well developed and nourished white male, aged 34 years.

"He complains of pains over both sides of his chest and heart and of having expectorated blood. Examination reveals no pathology of heart or lungs. Claims to have been struck by a falling tree while in service and sustained a head injury. X-ray does not reveal any head injury. A. G. O. says: 'There is no record of treatment found in support of alleged disability of head injury.' He also complains of having had pains in the head since alleged head injury. Says those pains start in the middle of back of neck and usually [fol. 135] go to the left temple. At times they go to the right temporal region. When they go to the right, they make him sick at the stomach and frequently cause him to vomit.

"There is some impairment of sensation on the right side.

"Positive Romberg. Goes backward usually, at times slightly to the right.

"Coordination poorly done, overlapping. Abdominals and cremasterics are absent." What would that mean?

A. Oh, it is a group of reflex movements that you get in the tests.

Q. Does it mean anything in this case?

A. It means simply impairment of his normal neuromuscular sense, due to the chronic organic disturbance of his cerebro-spinal——

Q. Doctor, answer this if you are familiar with this: Do you know whether or not the Veterans Hospital at Palo Alto is what is known as a neuropsychiatric hospital?

A. I understand so, but I am not certain of the fact.

Mr. Gerlack: It is exclusively for mental and nervous defects.

"Marked speech defect on test phrases. Blood Wassermann and Spinal Fluid are negative.

• • • • • • •

[fol. 136] Mr. Gerlack (Continuing):

"Appears to have had a definite paranoid trend toward his mother-in-law who died about one month ago. Says

she wanted to run his affairs, was constantly after him because he does not work and is the cause of his being here.

"Would rarely go out of the house without his wife. Did not want her to go out and leave him alone or have anything to do with the neighbors.

"Says that when he would go out alone he frequently got into arguments. People on the street called him S. B. Recently when going to Regional Office got into an argument, was arrested by police and fined $5.00. Says he was soon released.

"Is indifferent during examination and at time displays decided irritability. His answers are slow and he shows little or no interest in the examination. Emotionally he is slow, dull, indifferent and decidedly unstable.

"Attention is poor, associations are slow and narrow.

"Train of thought is retarded with blocking. Psychomotor activity is lessened.

"Has no ideas for the future and appears absolutely indifferent as to himself and the world in general.

[fol. 137] "Diagnoses: Psychosis with other diseases or conditions, (organic disease of the central nervous system—type undetermined)."

Q. What does that mean, "Psychosis", and so forth? What does that picture convey to you as a doctor?

A. Read that again.

Q. "Psychosis with other diseases or conditions (organic disease of the central nervous system, type undetermined)."

A. Well, you have two statements, he has a mental disease, he also has other diseases. That is in the first statement, the ear trouble and his gassed lungs. Then in the second statement you have—read that again, just that last.

Q. "Organic disease of the central nervous system, type undetermined."

A. Yes. Well, that is saying that there is something wrong, not with the mere working of his central nervous system, but the thing has been damaged, the organ, itself, has, and it is organic disease. For example, softening of the brain is organic disease, or the change of a man's brain caused by hitting him on the head with a sledge is organic disease. And when they say "organic disease of the central nervous system, type undetermined," it means he has organic disease of the central nervous system, but they don't detect or say what it is.

Q. That word "psychosis," is that the medical word for insanity?

A. Yes. "Psycho" is the word for "mind" in Greek, and——

[fol. 138] Q. In general terms, a doctor doesn't call it insanity, he calls it psychosis, is that right?

A. Yes.

Q. "Cicatrix, bridge of nose and right cheek, slight."—I guess that means scar?

A. He had scars, yes.

Q. "Absence of teeth," "Caries teeth," and following those are a bunch of numbers of teeth. "Caries teeth" means rotten teeth?

A. Decayed teeth.

Q. Calculus, Salivary," what is that?

A. It is a little stone that forms on the pipe that comes out from the spit gland.

Q. "Abscess, dental, Nos. 16, 17, 32.

"Treatment Recommended: Continued Hospitalization. (Patient discharged against medical advice November 16, 1931.)

"Case was presented to staff conference on November 16, 1931 and the staff agreed to the diagnoses given above. Patient is considered psychotic and incompetent."

Is that equivalent to saying he is incompetent and insane?

A. Yes.

Mr. Gerlack: "Is claimant bedridden? No.

"Will claimant accept hospital care? No.

"In your opinion, is it advisable that claimant resume his former occupation? No.

"Is he competent? No. • • •"

• • • • • • •

Mr. Gerlack: Isn't there a later examination?

Mr. Dillon: I believe there was one in 1934 but the file isn't here on it.

[fol. 139] Mr. Gerlack: Well, I have a copy of it. I might state on this report, your Honor, under the decisions prior to trial the courts have held that the plaintiff's attorney is entitled to see portions of these medical reports and make copies of them prior to trial, and in this particular case I went out to the United States Attorney and saw the

file and this examination was copied—dictated from the original. Counsel tells me that he hasn't the original here because the F. B. I. didn't return it to him. I went out and dictated that, myself.

Mr. Dillon: No question about that.

Mr. Gerlack: Very well. I will offer that as 1-G for Identification.

(Report of physical examination dated July 30, 1934, was marked "Plaintiff's Exhibit 1-G for Identification.")

Mr. Gerlack: This examination was made at Sacramento, California, begun July 30, 1934, and ended July 30, 1934. Examined at Sacramento by Dr. Bert S. Thomas, designated medical examiner for the Veterans Administration.

"19: Nervous system: Are brain, spinal cord, peripheral nerves and mentality normal? Answer. No.

"In quiet stage is of normal intelligence. Memory poor both for remote and recent events. Thoroughly oriented, but history of wandering off and not recognizing whereabouts for days. Goes from excitable resentful stages into sorrowful tears. In excitable stage, no possibility of holding attention, though in opposite this is well fixed. Deport- [fol. 140] ment: Gentle and good when quiet—however, two weeks ago when had partaken of three beers this man's deportment was out of all bounds. Becomes rather vicious, fighty, is off to get somebody and is likely to break up furniture, and so forth. Looked to all intents a killer type two weeks ago. No hallucinations apparently, but definite delusions of oppression at times—these times are practically always started with a drink or two of beer. Superficial reflexes throughout are greatly and equally (sides) accentuated. Not so of the deep ones. Romberg, negative. Patient is incompetent."

Let's see, it has the rest of the body here.

"Diagnoses: Psychosis-manic and depressive insanity incompetent; hypertension, moderate; otitis media, chronic, left; varicose veins left, mild; abscessed teeth roots; myocarditis, mild.

"Claimant not bedridden. Able to travel. Needs hospitalization."

"It says "isf"—I don't remember that—I guess it is "Needs hospitalization if excitable stages as described are

continually provoked. Will not accept hospitalization. Attendant necessary for travel. Claimant mentally incompetent. Guardian necessary. Examined him myself. Date 30 July '34. Examiner: Bert S. *Howard.*"

Mr. Dillon: What is the date of that, Mr. Gerlack?
Mr. Gerlack: July 30, 1934.

Q. Now, Doctor, what is manic depressive psychosis?
[fol. 141] A. May I just ask, is that Dr. Bert S. Howard, or Bert S. Thomas?

Q. It is Dr. Bert S. Thomas. If I said Dr. Bert Howard I meant Bert Thomas. I know both of them personally. Doctor, what is manic depressive psychosis?

A. Manic depressive psychosis is a form of insanity in which a person—a mind may be at one time working at over speed, in maniacal form, and at others in a depressed form with sometimes passing rapidly from one to the other and sometimes with long periods of normality in between. Sometimes you will find a person who shows practically nothing but the depressed states. Sometimes you have recurrent manic states.

Q. Do you think this man is a manic depressive?

A. Personally I think not. I think that his depressed periods and his periods of irritability, as I have seen it, and as I have read in affidavits, is not a true manic depressive but merely the utterly unguarded personal up-and-down reactions of a man thinking only about himself, getting unduly angry because of his being put upon, his delusions of persecution, and being in the true depressed state of manic depressive, where a man is practically almost without thought for periods, despondent, suicidal, and so on, and that is merely the lack of interest in the whole thing. Sits like a chunk without interest in what is going on. Exactly as the doctor has commented on.

Q. In other words, some of the symptoms of dementia praecox and manic depressive psychosis are the same, is that correct?

A. Yes. All of us have little ups and downs, a little elated [fol. 142] at some times, a little depressed at others. I think I testified this morning we, all of us, have good days and bad days, ups and downs. Some fellows have more than others. We learn to control it because it is the thing to do. We don't show our tempers and our depressions to the

public. But when we get a man without the ability to control those matters, doesn't care what impression he produces, he is going to flare up, he is going to show a lack of interest, but without there being a proof of true psychosis——

Q. Now, Doctor Thomas speaks of this: About two weeks before his examination, when he saw the man in his office, apparently, he stated the man appeared like a killer, looked like a killer. Do you think this man is dangerous?

A. I think any man that has delusions of persecution is potentially dangerous, yes, sir.

Q. You agree with Dr. Thomas that the man should be hospitalized?

A. Yes, sir.

Q. Now, Doctor, do you remember the deposition of Mr. O'Neill, the boyhood chum, raised with him in Philadelphia, stated that sometimes the man would be himself and other times when he would be crying, other times when he seemed to be out of his mind? What is the definition of an insane person from the standpoint of employability, occupationally?

A. Well, all definitions of an insanse person are purely questions of definition——

[fol. 143] Q. From the standpoint of performing an occupation without endangering his health.

A. I don't know of any definition. Obviously, if a man were called upon to follow an occupation and he was inclined to spells of excitement you wouldn't put a man of that type on, let us say, to work in a boiler shop or work in an insane asylum, or work in any other place where he was subjected to a great deal of mental strain and disturbance. That no doubt would impair him. If you would place him to work in a gold mine with possible delusions of spirits behind the next bar of gold, or working in a morgue, it would be detrimental to his mental health.

Q. Now, take the case of Mr. Galloway: What would be the effect on his mental condition if he were to work or follow an occupation?

A. An occupation or what?

Q. If he followed an occupation or worked, what, in your opinion, would be the effect on his mental health?

A. So far as the occupation was such that he could follow it as a mere matter of routine, I don't think it would hurt him. When it came—he would terminate the occupation by

having no incentive, no moral incentive to accommodate himself to the circumstances and go on with the occupation. The first time anything cross his disposition he would quit, he would curse at the employer——

Q. Well, would you say—suppose he had a steady job where he had to be on the job at a certain time every [fol. 144] morning, work all day, with an hour off for lunch, quitting at a certain time every evening, competing, we with say, with normal people for the job: What would be the effect on him?

A. He wouldn't do it.

Q. What would happen if he tried it?

A. He wouldn't come to work on time and he wouldn't get by. He wouldn't feel any of the responsibility imposed on the normal man by the position. If he didn't want to do anything he wouldn't do it. That is why the praecoxes don't hold their jobs. A man breaking down mentally, the first thing you know he is out of a job, he gets out of a job, and then he begins to believe that everybody has got something in for him. It is a perfectly typical story.

Q. Now, getting back to the testimony—you sat in the courtroom, and heard all the testimony in this case?

A. Yes.

Q. Now, taking the testimony and the observations made by Mr. Tanikawa, would you say at that time, based upon the observations he described and the occasions he described of Mr. Galloway, that at the time of that episode on the banks of the Marne, on the firing line, in June or July, whenever it was, in 1918, that he was sane or insane?

A. Oh, I think he was insane at that time, yes, sir.

Q. And what would you say, basing your opinion upon the observations made by Mr. O'Neill in April and May of 1919, when Mr. Galloway first came back from the Army, in Philadelphia? Would you say, based upon those observa- [fol. 145] tions, that he was sane or insane?

A. Is it proper for me to go back further in O'Neill's statements?

Q. You may give that as your reasons after you answer the question.

A. Ask the question again?

Q. Assuming that the observations which Mr. O'Neill made are true, after Mr. Galloway first came back from France—that was in either April or May, of 1919—assum-

ing those facts to be true, would you say that Mr. Galloway was sane or insane?

A. He was insane.

Q. Will you give us your reasons? Just tell the jury your reasons for that.

A. O'Neill testified that prior to his induction into the service he was working as a longshoreman, and so forth, along the waterfront, with no interruptions, he was able to hold his jobs, he didn't get into trouble, he didn't get fired, he was recognized as part of the neighborhood, and so forth. And at no time after he went into the war do we find him able to hold any kind of a job. He broke right down. That begun, as far as I can figure out, with his being subjected to the additional strain of induction into the military service. It all happens between the time that he was working normally and had gone alongshore as a normal longshoreman to hire with the gangs, and there concluded to go into the Army, as the boys did, and from there on he began to go down hill. The first thing we hear of him in [fol. 146] France he created a disturbance and blacked the eye of an officer, as was testfied by—I think it was Tanikawa that heard it but didn't see it——

Q. No, Wells is the one that saw it. Tanikawa heard it.

A. And he had to be tied and gagged to quiet him. From then on—and the time he was subjected to acute delusions there on the Marne. He told me that he was in the Argonne, and that he got hit on the head with a tree——

Mr. Dillon: Doctor, you have already testified you couldn't believe anything he said.

A. Yes, sir, but I was just coming more particularly to the question of his delusion or condition at that time.

Mr. Gerlack:

Q. Do you believe that the story that he was hit on the head in the Argonne with a tree was a delusion?

A. It is a question whether he was or not. The Jap said he was. The Government said he was not. I don't believe him, but all I know is if a man in June, 1918, was capable of believing the Germans were crossing the river when the men next to him didn't hear any, or see any, he was in the mental state that two months later would make him be-

lieve, when he was in the Argonne, he was hit on the head with a tree.

Q. Is that a typical case of dementia praecox?

A. It is a typical case of acute hallucinations and delusions derived therefrom.

Q. You heard the deposition of Colonel Matthews, the Commanding Officer of Company A. 20th Infantry, on that [fol. 147] second enlistment, did you?

A. Yes, sir.

Q. Does a man have to be violent to be considered insane?

A. The medical definition of insanity is different from the legal definition, but I think your medical definition of insanity is apparently based upon a man's inability to fit himself into the environment he finds himself in and get along with other people.

Q. You heard the deposition of the Commanding Officer on the second enlistment?

A. Yes, sir.

Q. Would you say, assuming that those observations his Commanding Officer made were true, at that time he was sane or insane?

A. Oh, I think he was insane. He did his routine work fairly well——

Q. Are persons suffering from dementia praecox able to do their routine work?

A. They do routine work quite well for a while—that is what aids them to get their jobs, that is what enables them to get their enlistment, and the things they do without being crossed, without being subjected to pressure from the outside they do pretty well.

Q. Do you remember the deposition of Colonel Mathews, who was the Chaplain, who saw him when he was hospitalized for six weeks in the post hospital at Fort MacArthur, in the mental ward there?

A. Yes.

Q. Assuming those observations of Colonel Mathews to [fol. 148] be true, would you say at that time he was sane or insane?

A. He was insane.

Q. Did you hear the deposition read of Commander Comfort B. Platt, his Commanding Officer in the Navy?

A. Yes, sir.

Q. When he was on board the "Olympia"?

A. Yes, sir.

Q. Would you say, assuming those observations to be true, that the man was sane or insane at that time?

A. Definitely insane, yes, sir.

Q. That was 1920?

A. Yes, sir.

Q. Now, Doctor, to be insane does a man have to be insane or manifest it all of the time or can he be insane part of the time and have lucid moments part of the time?

A. Absolutely, a man's mind can be disordered to a point where, as I say, he can't accommodate himself to society, but he may not be completely or entirely insane in all his exhibited—in all his mental——

Q. Looking back into the case, assuming the facts you have heard in the court-room to be true, do you believe this man has been insane at all times, at least since July, 1918, the time of this episode on the Marne?

A. Yes, I think he has been insane to the point that he was unable to adapt himself. I don't mean he has not had moments when he could not perform some routine tasks.

Q. Are you speaking from an occupational standpoint when you say he has been insane?

A. Yes, sir.

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[fol. 149] Q. Doctor, have you had experience examining soldiers for the Service, yourself?

A. Yes, I examined everybody who was inducted west of 15th Street, here—three of us started in on it; one went into the Service, one went into a hospital, and I stayed on, and I examined the inductees from the entire district west of 15th street in 1917 and 1918.

• • • • • • •

Mr. Gerlack:

Q. What are the probabilities, Doctor, that a man could enter the service—an insane man enter the service and be examined and be accepted for either the Army or Navy?

A. I have examined both for the Navy and the Marines in town, for the first examination, and also for the Service, and as the examinations were conducted at that time—that is, in 1918, 1919, 1920 and 1921, it would have been no trick at all for a man who was reasonably conforming to get into

the Service. The present type of examination for the draft now, with the psychiatric examination on suspected cases, of course, has eliminated a lot of cases of persons that went through before.

Q. You mean it is a different type of examination now?

A. It is a different type of examination now.

Q. By the way, Doctor, are you the only doctor in town who specializes in neuropsychiatry?

A. No.

* * * * * * *

[fol. 150] Cross-examination.

Mr. Dillon:

Q. Doctor, I understood you to say that you didn't hold yourself out as a specialist in mental and nervous diseases, is that correct?

A. I am not a specialist, no.

Q. There are a number of specialists here in Sacramento, are there not?

A. No, sir. There are a number of men who give special attention to it, but who are engaged in other types of practice as I am. There is no other man that I know of that engages exclusively in the practice of neuropsychiatry.

Q. You are positive about that, that there aren't men that hold themselves out as experts in psychiatry?

A. I don't know what they hold themselves out as, I simply said I know of no one that devotes attention exclusively to that work.

Q. You first saw this plaintiff in August, 1941, is that correct?

A. I think so, August or September—August, I think.

Q. And you made an examination at that time?

A. Yes.

Q. And that examination was for the purpose of testifying at this trial, was it not?

A. It was for the purpose of familiarizing myself with the case, yes.

Q. To testify at the trial. May I ask you what fee you are being paid, Doctor, for your testimony?

[fol. 151] A. That is a matter that has not been determined, and which I never discuss prior to going on the stand. I have been asked that so often that I avoid it.

Q. What would you estimate your fee to be?

Mr. Gerlack: Just a moment. We object to that as calling for a conclusion, and speculative, and conjectural. He is not through yet.

The Court: The objection is overruled.

A. Beg your pardon?

Mr. Dillon:

Q. What do you estimate your fee will be?

A. They pay me $50 a day in the State courts.

Q. I understood you to say, Doctor, at the time of your examination this plaintiff's mental condition was such that he could not give a coherent history previous to the examination, is that correct?

A. No, I don't think that is my exact statement.

Q. Is that the significance of it?

A. The significance of my statement was that I thought because of his mental disability he wouldn't give a statement either adequate or reliable.

Q. Accordingly, then, Doctor, the history of the periods covered here from 1919 to 1922 is what you have heard in the court-room?

A. Yes, sir, based upon the evidence.

Q. And, Doctor, what do you know of the activities of this man from 1922 to 1930?

A. From 1922 to 1925 we have practically O'Neil's state-[fol. 152] ment and the statement in one of the papers read this morning that he had earned a limited number of dollars during the 20 years which would cover that part as well.

Q. What do you know of his activities between 1925 and 1930?

A. 1925 to 1930 I know nothing whatever except his getting married.

Q. And you don't think it is necessary for you to know what he was doing between 1925 and 1930 to arrive at a conclusion as to his condition in 1919?

A. I think the condition in 1930 is very well fixed by the Government's Veterans examination there.

Q. I said between 1925 and 1930.

A. And I say I don't think that is essential. We have a continuing disease, quite obviously beginning during his military service, and quite obviously continuing in 1930, and the minor incidents don't seem to me——

Q. Well, if he was continuously employed for eight hours a day from 1925 to 1930 would that have any bearing on your diagnosis?

A. It would have a great deal.

Q. It would be necessary for you to know, or it would be helpful for you to know what he was doing between 1925 and 1930?

A. No, I testified from the information I had.

Q. Is there such a thing as a predisposition to dementia praecox?

A. Well, dementia praecox is acceptable on a basis of a hereditary inadequacy; it is not a disease that comes from [fol. 153] syphilis or comes from injury, except so far as the injury, physical or mental, serves to break down an already fragile mental constitution.

Q. And until that happens a man can carry on as an ordinary individual can he not?

A. Many do, yes, sir.

Q. And, Doctor, as I recall the testimony, the first service of this man in the war—there were two incidents that were referred to during his whole period of enlistment: One, he had an altercation in camp one night, and the after result was that the lieutenant had a black eye, the other was that he was on the Marne, and one night hollered, "The Germans are coming," which turned out to be a false alarm, and his excitement was so great he had to be gagged. Do you recall any other unusual episodes during that period of enlistment?

A. I don't know whether getting drunk is unusual or not.

Q. Well, include getting drunk, although I don't recall during that particular enlistment that anyone said he got drunk.

A. I would say no.

Q. Then on those two isolated episodes, I understand you, as a physician, state emphatically and definitely that this man was crazy when he was released from the Army in 1919, is that correct?

A. It would be impossible, of course, without any later history, without any later examinations to determine after a period of twenty years that on those two isolated events, but when you take testimony as to his relation to society [fol. 154] before he entered the Army—those two incidents

occurring within a few months after his induction and subjection to the strain——

Q. Aren't you mistaken there, Doctor? I don't want you to be mistaken—he was taken into the Army in November, 1917. This happened in 1919. Go ahead.

Mr. Gerlack: Well, the two events you talk about were in 1918, were they not, Doctor?

Mr. Dillon: You stated "shortly after his induction into the Army." I don't want you to be mistaken.

A. The matter of the Marne was in June, 1918, eight months after his induction, and the matter of his row—the war closed in 1918.

Q. 1918 is correct.

A. He was out in November, 1919, but the incident on the Marne is in June, 1918.

Q. That is correct.

A. So it would be five months after his induction in the fall of 1917.

Q. Well, seven months, but we will continue. Well, Doctor, at that time, without any subsequent history, in 1919 when he was discharged from the Army and you had the history of these two isolated incidents would you at that time state he was insane?

A. No. As I told you——

Q. Well, just answer—all right.

A. Ask the question again?

Q. Would you have stated at that time he was insane?

A. In 1919?

[fol. 135] Q. In 1919, when he was discharged from the army.

A. Assuming I had seen him in 1919 as O'Neill did, or not?

Q. No, O'Neill didn't see him until afterwards. At that time when he was discharged from the Army if you had before you the fact he had a fight and hit an officer, and the fact he gave this alarm and became so excited he had to be gagged, with that history would you have declared that man in April, 1919, when he was discharged, crazy?

A. I would reserve my opinion on that. I wouldn't have enough——

Q. And, Doctor, taking up Mr. O'Neill: What are the significant things that Mr. O'Neill said that would lead you to say the man was crazy?

A. Well, as I said before, insanity exists apart from the purely legal definitions, the inability of a man to accommodate himself to his environment, and certainly Mr. O'Neill's description of the plaintiff in Philadelphia in the spring of 1919, there, wasn't the normal conduct of a man that fit himself to his environment, weeping in back rooms, and so forth.

Q. Is your definition of psychosis, or, using the lay word "crazy", is it your definition that it consists of the inability to fit in in his environment?

A. That is a purely psychical definition, that is a pretty good definition. It is not a legal one.

Q. Then any man who is cranky, high-tempered, a bad actor, given to drink, and mean when he has hangovers, you would call that man suffering from a psychosis and crazy? [fol. 156] A. I don't think that set of facts presupposes his inability to fit himself into his environment.

Q. Doctor, Mr. O'Neill's testimony was that he saw this man for two years steady after 1919, and it has been shown as a matter of fact Mr. Galloway was in the Navy from January, 1920, to July, 1920, and in the Army from December, 1920, to May, 1922. Wouldn't that cast, in your mind as a doctor, some question as to the credence and reliability of Mr. O'Neil's testimony?

A. May I have the date of that service in the second enlistment in the Army?

Q. Yes.

Mr. Gerlack: Just a moment. We object to that as asking the doctor to pass judgment on the testimony of a lay witness here.

Mr. Dillon: He is taking the history as a base, and I am asking if he had these additional facts or would it not cast some question on the credence——

Mr. Gerlack: Well, he is assuming those facts to be true. If they are not true, it is up to the jury to say.

The Court: This witness has been called as an expert. Let the jury determine from the testimony what the facts are.

* * * * * * *

A. My recollection is that O'Neill was questioned on that at the time of the deposition and except for the first—in 1919 he saw him up to the termination of his service, and

[fol. 157] after that met him a total of 500 times, but didn't testify as to when, that it was a continuing observation until such time as the plaintiff went West in 1926. That is my recollection of it.

Q. Doctor, you said that his pre-war history showed that he didn't get fired from jobs, held his jobs. Where do you find anything to substantiate that?

A. I find it in Mr. O'Neill's testimony that they worked together as longshoremen up and down wherever there were ships, and that the plaintiff was sent out with another crew to Columbus, Ohio, on a job.

Q. Did he say any time, or did anybody say they weren't fired?

A. Beg your pardon?

Q. Did anybody say they weren't fired, Mr. O'Neill, or anybody else?

A. No.

Q. Doctor, you recall—I don't know his nationality—was he Japanese, that witness?

Mr. Gerlack: Mr. Tanikawa was Japanese, yes, American born.

Mr. Dillon:

Q. Mr. Tanikawa testified that Mr. Galloway after the incident of the false alarm with respect to the Germans, fought up in the Argonne. Now, if that were correct would that indicate to you that the Army and the men with whom he was in contact considered him crazy? In other words, do you think they would let him come after that incident [fol. 158] and be up in the lines with the Army if he were crazy?

A. It would seem to me, on the other hand, that the fact they did not—assuming they were in the Argonne—discipline him for an obvious malfeasance of that type would show that they needed the man, crazy or not, worse than they needed to discipline him for insanity at the time he was working. I think that if they hadn't recognized the action as a mental disability that they would have disciplined him and he would not have stayed in the service.

Q. In other words, your opinion of the Army is that they would keep crazy men in there to fight?

A. I think if they were going into the Argonne they would be very likely to, yes.

Q. Doctor, have you examined the medical examinations on the discharge of Mr. Galloway from the Army and on his enlistment in the Navy, and on his discharge from the Navy and his second enlistment in the Army?

A. You mean the actual photostats?

Q. Yes.

A. They were handed to me while the first deposition was being read yesterday, and I glanced through them very inadquately, because I was trying to listen to the first deposition at the same time. That is the only time I have seen them.

Q. In your opinion, based on your examination of Mr. Galloway in August, 1941, did you have an opinion that he was a moron?

A. I have no data on which to predicate—to assume a mental deficiency.

[fol. 159] Q. How many types of dementia praecox are there, Doctor?

A. Well, at the present time—dementia praecox originally was sort of a gather-all into which they threw all these earlier cases of mental deterioration that they couldn't otherwise explain. Now, they divide it into types, the schezophrenic type, the simple type, the catatonic type, and so on.

Q. What type would you call this?

A. I think this is schezophrenic. I think the general expression "dementia praecox" is going out of use generally. I think they are referring to schezophrenia as the primary name of the first classification now.

Q. Do you think, Doctor, there is coordination used by a soldier in the usual duties he performs in the Army?

A. You mean the manual of arms, and that sort of thing?

Q. All the different things he does.

A. Well, coordination is required, and he will do those things well and longer in which the coordination has become fixed in his nervous system, he may do the manual of arms and closed order drill, and those things long after he can't do other things and can't do new things.

Q. Do you think it is natural for a man to be chagrined and angry when he has not been made a non-commissioned officer when he thought he should be?

A. Well, it depends entirely upon his own appreciation of whether he is worth it, or not.

Q. Doctor, getting back to your definition of what you [fol. 160] consider psychosis or insanity, when Colonel Matthews in reply to a question, 'What about his getting on with his fellow soldiers?' answered, 'Very well,' would that indicate, according to your definition, that he was crazy at that time?

A. It would indicate merely that in the routine things he got along pretty well. I think in that same statement the Commanding Officer said his general influence was bad—was doing something else that is not included in that question.

Q. Do you recall why his influence, he thought, was bad, or might be bad?

A. I think it was he that said that the plaintiff was one of the older men, and that he was subversive of good order, discipline and so forth.

Q. Because he was considered a Bolshevik, was it not?

A. Yes, a Bolshevik.

Q. What is your interpretation of the term that we used to call a man and say, 'Oh, he is a Bolshevik'?

A. Against the Government.

Q. And what else?

A. That was enough at that time. It had no political connotation at the beginning of the use of the word in the United States.

Q. Did it mean in addition to against the Government a fellow that spouted off a lot?

A. Some of the fellows against the Government spouted off the least.

[fol. 161] Q. Did they call him a Bolshevik, the fellow that spouted off the least?

A. Yes, you can get a fellow into a corner and talk Bolshevism and against the Government. He doesn't necessarily have to be long-haired.

Q. Is it your idea that a man who is a Bolshevik, gets disgruntled, doesn't like discipline, and gets drunk is crazy?

A. No, by no means. As I have said before——

Mr. Gerlack: Just a moment. Let the doctor finish his answer.

Mr. Dillon: I beg your pardon.

A. As I said before, isolated instances of nonconformity do not constitute a symptom complex of schizophrenic insanity, but when you take the same recurring thing in one

form or another over a period of twenty years, with a terminal stage such as we have, it has got to be taken all in one detail to reach a conclusion.

Q. Doctor, taking the findings of the medical examinations from 1930—made by the Veterans Administration in 1934, do you think, with the condition that they found then, that Mr. Galloway would have been accepted in the service in 1919 by the Navy and in 1920 by the Army?

A. I think either the Army or the Navy, if they had made the class of examination——

Q. Just answer my question, if you will.

A. I beg your pardon. Ask it again.

[fol. 162] Q. I say, if the findings that were found in 1930 and 1934 by the medical examinations, if Mr. Galloway had been in that condition in 1920 and 1919, is it your opinion that he would have been accepted by the U. S. Navy and the U. S. Army for service?

A. You say if he had been in that condition. He might have been in that condition but unless he had been found to be in that condition by the examiner he might well have been accepted.

Q. Do you mean to tell me on these neurological findings, and these psychiatric findings as set forth in these examinations as evidence, apparent, and patent to the examiner, that if he had been in that condition, in the same condition in 1919 and 1920, he would have been accepted by the U. S. Army and Navy for service?

A. I said a man might well have been in that condition, and with the type of examination given—I don't know about the Army after the draft, but in the Navy and the Marines he might well have gotten by. They weren't looking for psychiatric illesses at that time.

Q. Well, Doctor, as I recall, it wouldn't take a doctor or anybody else, with these findings in front of him, to know that he was incompetent, would it?

A. I never was a Service doctor, I don't know.

Redirect examination:

Mr. Gerlack:

Q. Doctor, you mean by that to say it is possible he could have passed any Army or Navy examination that was made [fol. 163] during his lucid moments?

A. Particularly in view of the fact that he had been a Service man and a large part of his conduct was of a routine and prescribed type. I think, for example, if they challenged him on the question of why he didn't come out as a first sergeant or something that broke in on the routine he might have blown up right there, but as I recall the type of examination they did then, they weren't looking for that sort of thing.

Q. Doctor, have you found in your experience as an examiner for recruits of the Navy, and also for the Marine Corps in Sacramento, that the regulations require that men be given a special neuropsychiatric examination or just a physical examination for enlistment?

A. They only did physicals at that time.

Q. And mentals——

A. Mentals apparently were only done at Mare Island in those days.

Q. Are you still a designated examiner for the Marine Corps?

A. No.

Q. Not at the present time.

• • • • • • •

Mr. Gerlack:

Q. Doctor, I neglected to ask you this highly pertinent question, here. In your opinion, you believe that Mr. Galloway's present condition of dementia praecox is permanent in that it is reasonably certain to last throughout his lifetime?

A. Yes, sir.

[fol. 164] Q. Do you believe it is or is not curable?

A. I wouldn't say, for this reason: That we have in the last three or four years developed a number of very modern treatments by shock and what-not, for certain types of dementia praecox, but I haven't sufficient data to enable me to say as to what the percentage of chance of recovery is upon old cases. That is purely a thing that the results of State Hospital experience will have to develop in the future.

Q. In other words, it is speculative, to say the least?

A. It is purely speculative. Without the development of the shock treatment, I would say——

Q. What is the probability, that it will or will not last as long as his lifetime?

A. I expect it to last the rest of his life.

Mr. Dillon: I object to that as conjectural.

Mr. Gerlack:

Q. Do you think drinking and being drunk around the home, here, had anything to do with his present condition?
A. It wouldn't make him this way, no.
Q. It wouldn't cause this condition?
A. No, it would not.

• • • • • • •

Mr. Gerlack:

Q. Doctor, assuming that he deserted from the Army on August 6, 1921, after enlisting in December, 1920, and surrendered in San Bernardino, California, where he was restored to duty on November 28, 1921, and was arrested again in May, 1922 for desertion, is this desertion from the Army and also these jumping of ships that are in his record [fol. 165] —does that have any significance from the standpoint of a person suffering from dementia praecox?
A. It seems to me they are perfect examples of what I have tried to explain before, of a man being guided purely by his personal desires, without any thought of its bearing on the outside world. His desertions from the Army are perfect examples of this.

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The Government's Case

Earl Shipp, a witness called on behalf of Defendant, being first duly sworn, testified as follows:

Direct examination:

Mr. Dillon:

Q. Where do you reside, Mr. Shipp?
A. At Holbrook, California.
Q. What is your occupation?
A. Retired soldier.
Q. With what rank?
A. Master Sergeant.
Q. How long were you in the Army before you retired?
A. 30 years.

Q. In the latter part of 1920 and the early part of 1921 where were you stationed in the Army?

A. At Camp Travis, Texas.

Q. And were you first sergeant at that time?

A. Yes, sir.

Q. Do you recall with what company and outfit?

A. A Company, 20th Infantry.

Q. And at that time was there a man by the name of [fol. 166] Joseph Galloway a member of your company?

A. Yes, sir.

Q. Do you recall him?

A. Yes, sir.

Q. What was his reputation at that time as to drinking?

A. Well, he drank——

• • • • • • •

Mr. Dillon:

Q. Do you recall and were you a witness at the time he was court martialed for being drunk?

A. Yes, sir.

Q. While on duty and performing his duties as a soldier during that period did you ever see him under the influence of liquor?

A. Not on duty.

Q. At that time did his actions appear to you to be that of a normal or abnormal person?

A. Normal.

Q. Judging from your daily association with him and knowing his activities in your company, and among his fellow soldiers, was there anything that led you to suspect then that he might have been insane?

A. No, sir.

Q. Did he take his orders and do his duties as a regular soldier?

A. Yes, sir.

Q. And to the best of your recollection that was in the period of the fall of 1920 to the spring of 1921?

A. Yes, sir.

Cross-examination:

Mr. Gerlack:

Q. By the way, who was commander of the company?

A. Captain James E. Matthews.

Q. He was a first lieutenant, I believe, at first, and later captain?

A. Well, he may have been, just at that time. He was [fol. 167] my company commander as a first lieutenant and also as a captain.

Q. He is now Lieutenant Colonel James E. Matthews, stationed at Dahlonega, Georgia?

A. Well, he may be.

Q. Or do you know?

A. I couldn't say.

Q. By the way, you never—during the time you were first sergeant of the company you never knew of Galloway taking any dope or anything like that, did you?

A. No, sir.

Q. Pretty undependable as a soldier, wasn't he?

A. He was dependable.

Q. Was he undependable?

A. No, not undependable, he was dependable.

Q. If Captain Matthews stated he could not be depended upon would you say Captain Matthews was wrong?

A. Well, I would, yes, sir, in that case.

Q. Did Galloway ever indicate to you he didn't think he was getting a square deal in the company?

A. No, sir.

Q. The officers and other members of the company called him a Bolshevik, didn't they?

A. No, I don't think so.

Q. Wasn't he quite all out of tune with things?

A. No.

Q. Who would be more likely to be in a position to know what went on in the company, you or the Captain?

A. Well, I believe I would.

Q. By the way, were you at Camp Travers, Texas, when he deserted on August 6, 1921?

A. He didn't desert while he was in my company.

Q. Were both of you in the company on August 6, 1921?

[fol. 168] A. Well, I—I couldn't exactly—the dates is not very clear to me just when he transferred from that company.

Q. You don't remember very much about this case, do you?

A. Well, I remember when the man transferred from the company, and his reputation while he was in the company?

Q. Pretty contenious, always fighting with the men, wasn't he?

A. No, sir.

Q. Weren't the rest of the men afraid of him?

A. There was no one afraid of him I knew of.

The Court:

Q. Were you afraid of him?

A. No, sir.

Mr. Gerlack: First Sergeants don't come that way, Judge. That is why they are First Sergeants.

The Court: What is this?

Mr. Gerlack: This the Army record, A. G. O.

Q. Were you connected with Company A of the 21st Infantry on August 6, 1921?

A. Not the 21st Infantry, no, sir.

Q. You were not?

A. Not the 21st, no.

Q. Or the 20th, rather?

A. The 20th, yes.

Q. Do you recognize any of the handwriting on that A. G. O. record, there?

Mr. Dillon: It has not been identified or placed in evidence, but I have no objection.

The Court: What is the question?

Mr. Gerlack: The question is if he recognizes any of the handwriting on that.

The Court: Whose handwriting?

[fol. 169] Mr. Gerlack: I am just asking if he recognizes any of it, some of it may be his.

The Court:

Q. Do you see your handwriting there any place?

A. No, sir.

Mr. Gerlack: Very well.

Q. By the way, who made the entries in the Service Record, you or the Company Clerk?

A. Well, it was usually the Company Clerk, sometimes I made that out.

A. Only about 60 men in the company at that time?

A. Well, there was more than that, sir.

Q. Small Company?

A. There was more than that. There was about 60 in the company after they transferred that bunch——

Q. Captain Matthews was the only officer in the company for quite a while, wasn't he?

A. Yes.

• • • • • • •

Counsel for defendant next read in evidence the deposition of Dr. George F. Klemann, taken by the Defendant on May 6, 1941, in New York City. The Government was represented by Mr. Robert A. Peattie, and the Plaintiff by Mr. John P. Hurley.

Dr. George F. Klemann, first being duly sworn to testify to the truth, answered as follows:

[fol. 170] "Q. What is your full name?

"A. George F. Klemann.

"Q. And where do you reside?

"A. 250 Lexington Avenue, New York City.

"Q. And you are a member of the medical profession?

"A. I am.

"Q. For how long have you been practising, doctor?

"A. I graduated in 1903.

"Q. And from what college are you a graduate?

"A. Long Island College Hospital, Brooklyn, New York.

"Q. And have you specialized in any particular branch of medicine?

"A. No. Just general medicine.

"Q. And you have been engaged continuously in your profession since the above mentioned time?

"A. Yes I have.

"Q. Have you been attached to any Hospitals or Institutions?

"A. I was at St. Vincents Hospital, for eight years, and at Bellevue Hospital for seven years.

"Q. In 1920 were you a doctor in the United States Army?

"A. No in 1920 I was a Lieutenant in the Medical Corps of the U. S. Naval Reserve.

"Q. Now doctor do you know one Joseph Galloway?

"A. No I do not know him.

"Q. You have no personal recollection of Joseph Galloway?

"A. None what-soever.

[fol. 171] "Q. Now during the year 1920 doctor where were you stationed?

"A. I think at that time, I was on the Receiving Ship Bay Ridge, Brooklyn, New York.

"Q. Now I show you doctor a set of photostatic copies of medical history pertaining to one Joseph Galloway and I ask you to look at these and see whether you recognize them?

"A. I recognize No. 2 and No. 3, Medical History Sheets.

"Q. No. 2 and No. 3 are signed by you?

"A. Yes.

"Q. You don't remember Joseph Galloway, do you doctor?

"A. No I do not.

"Q. Now using the Governments Exhibit 1 and Governments Exhibit 2 for identification, would those refresh your recollection in any way as to one Joseph Galloway?

"A. Yes they would.

"Q. And would they refresh your recollection as to an examination made by you of one Joseph Galloway?

"A. They would.

"Q. Now can you state doctor after refreshing your recollection looking at these two exhibits for identification, whether or not you made an examination of Joseph Galloway on July 8th, 1920?

"A. Yes.

"Q. Now from an examination of these exhibits and the refreshing of your recollection, will you please state what you found to be the condition of Joseph Galloway on that date?

[fol. 172] "A. On this date, from the examinations made it was a termination of services on account of bad conduct discharge.

* * * * * * *

"A. (Continued: I found that when I examined him he had no disabilities.

"Q. When you say disability doctor, just what do you mean?

"A. His physical condition.

"Q. Do you recall from refreshing your recollection as to just what examination you made of him?

"A. Well you have to make a complete physical examination of all men discharged.

"Q. And that was your procedure in connection with your duties as to this sailor?

"A. Yes it was.

"Q. And you found after such examination that Joseph Galloway was not suffering from any physical disability?

"A. That is right.

"Q. Now refreshing your recollection doctor, and looking at Governments Exhibit 2 for identification, do you recall whether Joseph Galloway made any statement to you as to whether or not he had any war risk insurance?

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"A. Yes. He stated to me that he had no insurance.

"Q. And do you know whether or not in addition to making that statement he affirmed his signature to a statement to that effect?

• • • • • • •

[fol. 173] "A. He did.

"Q. Now doctor are you familiar with the records such as were kept by the Government when a man applied for his discharge, or such records as were kept by the Government in connection with the Medical reports of any enlisted man in the Naval Service?

"A. I am.

"Q. Now doctor, when you examined Mr. Galloway did you note everything that your examination disclosed?

"A. Yes.

"Q. And did you notice anything in connection with the examination of Joseph Galloway as to his mental condition?

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"A. He had no mental defects as far as I could see.

"Q. Do you know doctor whether there was anything unusual about his conduct which would indicate to you when you made the examination anything which would indicate any mental defects?

• • • • • • •

"A. I di- not notice any.

"Q. And was it your practice doctor in connection with the examination of persons, such as Joseph Galloway to indicate in your report a record if there were any mental defects which you might have noticed?

"A. It was.

"Q. And you made no notation of any mental defects in your examinations of Joseph Galloway?

[fol. 174] "A. I did not.

"Q. Will you look at Defendants Exhibits 3, 4, and 5 marked for identification and tell me doctor whether these are not the forms as were used by the Government at that time?

"A. They are.

"Q. And looking at these records doctor, see if there is anything which might refresh your recollection as to whether or not Joseph Galloway was treated for anything during the periods, between January 18th, 1920, and July 8th, 1920.

• • • • • • •

"A. Those are merely sheets from the health record showing the date of his enlistment at Philadelphia.

"Q. That is Exhibit 5 for identification?

"A. Yes, and on the medical abstract it shows from January 15th, 1920 to the date of discharge July 8th, 1920 that he had no sick days. That is indicated on exhibit 3 for identification. Abstract on exhibit 4 for identification, it shows the typhoid prophylaxis he received on January 20th, 1920, second one on Jan. 27th, and the 3rd on February 3rd, 1920.

"Q. Doctor what do you mean by prophylaxis?

"A. Typhoid prophylaxis is a procedure that every man or every recruit receives in the service.

"Q. Now after refreshing your recollection from the examinations made of these exhibits, one to five inclusive, and marked for identification, are you in a position to state whether this man received any treatment at all during that [fol. 175] period; any medical treatment or was incapacitated between January 15th, 1920 and July 8th, 1920, other than for the prophylaxis treatment he received?

"A. He received no treatment whatsoever. His records show that he had no sick days out during that time.

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"Cross-examination.

"By Mr. Hurley:

"Q. Doctor is it not a fact in the medical profession, mental disease is considered an ailment which is treated by specialists in that particular line?

"A. Well that all depends on what you mean by mental diseases.

"Q. For instance; dementia praecox?

"A. Years ago the general practitioner took care of all of those sorts of cases, and it is just recently that the psychiatrists have come to the fore and are taking care of all these mental cases.

"Q. Well at the time that you examined Joseph Galloway, the Plaintiff herein, that was on the occasion of his discharge from the service, was it not?

"A. It was.

"Q. From the United States Navy.

"A. That is right.

"Q. And at that time, the examination that you made of him was for the purpose of determining whether or not he had any physical disability, is that not true, doctor?

"A. That is right.

[fol. 176] "Q. You did not make any tests at that time to determine whether there was any mental impairment?

"A. I did not, because that is not done.

"Q. As a matter of fact you have no personal recollection of making the examination at all?

"A. I have not.

"Q. The testimony that you have given as above is purely from the records which have been exhibited as Defendants Exhibits one to five for identification?

"A. That is right, because they were discharging thousands of men, and it is very hard to pick out an isolated case.

"Q. I show you Defendants Exhibit Nos. 3, 4, and 5, for identification and ask you whether or not the data contained thereon was put on there by your direction or not?

"A. The only one was the signature of the medical officer, L. W. Bishop who was my superior officer in the Medical Department on the Receiving ship at New York at the time of his discharge.

"Q. But the facts thereon you yourself did not put in?

"A. No.

"Q. And they were not put on there at your direction?
"A. The only one was Dr. Bishop's, and was after I examined the man he put his signature on the abstract to ose the record. That is, Exhibit No. 3, marked for identification.
"Q. What I am trying to find out doctor is this, as distinguished from the signature of Dr. Bishop's? I am re-
fol. 177] ferring more to the factual data in the report, hich is described at the top as 'Medical Abstract'. You ad nothing to do with placing that on the exhibits 3, 4 nd 5?
"A. No that was done by the other medical officers.
"Q. In other words, he was examined by other men and ey made that record?
"A. That is right.

• • • • • • •

"Redirect examination:

"Q. Doctor, if in connection with your examinations of oseph Galloway, he exhibited any unusual conduct which ould in any way indicate any mental disability, you would ave noted it on your record, would you not?
"A. I certainly would.

• • • • • • •

"Recross-examination:

"Q. Doctor is it not possible that he may have exhibited y his conduct at other times, a condition which would suggest a mental ailment, and not exhibit it at the time that ou were examining him?
"A. That could be possible."

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The Defendant then introduced in evidence without objection, Defendant's Exhibit A.

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fol. 178] Mr. Dillon: Government's Exhibit A is marriage license, James Joseph Galloway and Freda Elizabeth alindo.

"I hereby certify that I am Minister of the Gospel and hat" — and so forth — and he married the two people on ebruary 14, 1929. "George G. Saywell, Pastor, Methodist Episcopal Church."

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The Defendant then introduced in evidence Defendant's Exhibit B.

Mr. Dillon: * * * "Application for Insurance. My name is Joseph Galloway. Signed Columbus Barracks, Ohio, the 10th day of December, 1920." It reads as follows:

"The provisions of the Act of Congress approved October 6, 1917 so far as it relates to insurance have been explained to me, and I understand my rights and privileges under that Act, but I do not desire to apply for any War Risk Insurance."
Signed: "Joseph Galloway." Dated "December 10, 1920."

Mark this Defendant's Exhibit C.

(A. G. O. file marked "Defendant's Exhibit C.")

Mr. Dillon: The defendant offers in evidence Defendant's Exhibit C.

Mr. Gerlack: If your Honor please, counsel knows that parts of that are admissible and parts are not. The same rule applies as to the Government medical records. This should be marked for identification and read the pertinent parts.

[fol. 179] Mr. Dillon: May I read certain portions of this, your Honor?

"United States of America, War Department, Washington, February 7, 1940. I hereby certify that the documents hereto attached pertaining to Joseph Galloway, Army Serial R-554210, who enlisted November, 1917, was honorably discharged April 29, 1919. Again enlisted December 7, 1920. Deserted the Service May 6, 1922 and now is a deserter at large, are photostatic copies of two enlistment papers; two service records; report of physical examination for enlistment November 1, 1917; report of physical examination for discharge dated April 28, 1919; two medical cards; field medical card; report of desertion, and two pages of correspondence, the originals of which are on file in the Adjutant General's Office. (Signed) E. S. Adams, Major General, the Adjutant General."

I will read certain portions of these. It will be noted he enlisted November 1, 1917.

"Summary court martial approved February 2, 1918, Articles of War 61. To be confined at hard labor for two months and forfeit two-thirds of pay per month."

Mr. Gerlack: What is the date of that?
Mr. Dillon: February 2, 1918.

"February 28, 1918, character fair, J. H. Metzger, Commanding Officer."
[fol. 180] "Date of admission Receiving Hospital, September 24, 1918. Days of treatment in current case: September, in hospital seven days; October, in hospital 31 days; November, in hospital 30 days; December, in hospital 18 days. Base Hospital date of admission, September 24, 1918. Cause of admission, influenza. Disposition: Returned to duty Class A January 3, 1918."

Mr. Gerlack: Does it state how many days he was in the hospital there?
Mr. Dillon: It is totalized 101 days.

"Report of physical examination of enlisted man prior to separation from service in the United States Army. Joseph Galloway, Private, Company G, 8th Machine Gun Battalion. Declaration of Soldier: Question. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in the military service? A. No."
"What was the disability, how was the disability incurred," all blank.
"I declare that the foregoing questions and my answers thereto have been read over to me, and that I fully understand the questions, and that my replies to them are true in every respect and are correctly recorded. (Signed) Joseph Galloway. Witnesses: M. K. Wilson."

[fol. 181] The Court: What is the date of that?
Mr. Dillon: The date is on the next page, which is Certificate of Immediate Commanding Officer.

"I certify that, aside from his own statement I do not know, nor have I any reason to believe, that the soldier who made and signed the foregoing declaration has a wound, injury, or disease at the present time, whether or not incurred in the military service of the United States.

(Signed) M. K. Wilson, Captain, U. S. A., Dated April 28, 1919."

"Certificate of Examining Surgeon.

"I certify that the soldier named above has this date been given a careful physical examination and it is found that he is physically and mentally sound. (Signed) J. W. Bauman, Major, Medical Corps, U. S. Army, April 28, 1919."

Do you care to look at this (handing paper to Mr. Gerlack)?

Mr. Gerlack: Yes. All right, put it in. No objection.

Mr. Dillon: Mark this Defendant's Exhibit D.

(Navy Service Record was marked "Defendant's Exhibit D.")

Mr. Dillon: The Government offers in evidence Defendant's Exhibit D.

Mr. Gerlack: The same rule would apply there. It is marked for identification and read permissible parts.

Mr. Dillon: May I read certain parts?

[fol. 182] "United States of America, Department of the Navy, Washington, D. C., March 6, 1940.

"I hereby certify that the annexed is a transcript of the service of Joseph Galloway, ex seaman Second Class, U. S. Navy, who enlisted January 15, 1920 and was discharged on July 8, 1920 with a bad conduct discharge in accordance with sentence of Summary Court Martial approved June 2, 1920, as shown by the records on file in the Bureau of Navigation. Randall Jacobs, Acting Chief of Bureau, and certified to by Acting Secretary of the Navy.

"The records of the Bureau show the following transcript of service of Joseph Galloway, Service No. 242-43-40, who was born June 29, 1891, in Philadelphia, Pennsylvania, and gave next of kin as sister, Jennie Galloway: January 15, 1920, enlisted as apprentice seaman at Philadelphia, Pennsylvania, for two years; January 15, 1920, rating changed to seaman, second class. January 15, 1920, transferred to receiving station, Philadelphia, Pennsylvania.

"February 20, 1920, transferred to U. S. S. 'Olympia'.

"June 2, 1920, transferred to receiving ship at New York.

"July 8, 1920, bad conduct discharge from receiving ship at New York in accordance with sentence of Summary Court Martial.

"2 There is no record of his having applied for insur-
[fol. 183] ance." Mark this Defendant's Exhibit E.

(Navy Medical Record Marked "Defendant's Exhibit E.")

Mr. Dillon: The Government will offer in evidence Defendant's Exhibit E.

Mr. Gerlack: The same rule, for identification.

Mr. Dillon: I will read certain portions.

"United States of America, Department of Navy, Washington, D. C., March 11, 1940.

"I hereby certify that the annexed five photostats constitute a complete photostatic copy of all available medical record in the case of Joseph Galloway, ex apprentice seaman, U. S. Navy, on file in the Bureau of Medicine and Surgery. (Signed) Ross T. McIntire, Chief of the Bureau of Medicine and Surgery."

May I read certain portions, your Honor?

"Descriptive Sheet. Physical examination. Place, Philadelphia, Pennsylvania. Date, January 15, 1920. Nationality, White, U. S. Height, 64-1/4 inches. Weight, 129 pounds. Marks, scars, and so forth: Tattoo: Anchor, cross inner rft; Eagle clasped hands bird inner rfa; blue ink marks Web 1 thumb.

"Termination of health record. Receiving Ship at New York, July 1920. Physical defects disqualifying for continuation in service, none. Signed G. F. Klemann, First Lieutenant, M. C."

[fol. 184] "Medical History Sheet, page 3. I have no disability entitling me to compensation under the War Risk Insurance. Amount of Insurance, None. Signed Joseph Galloway, Receiving Ship at New York. Examined this date upon discharge and found to be free from all physical disabilities. L. M. Brookhart, Commander; G. F. Klemann, First Lieutenant."

"Page 4. Typhoid Prophylaxis."

Mark this Defendant's Exhibit F.

(Letter dated April 16, 1940, from the Department of the Navy, Office of the Judge Advocate General, was marked "Defendant's Exhibit F.")

Mr. Dillon: I offer in evidence Defendant's Exhibit F.

"Department of the Navy, Office of Judge Advocate General, Washington, D. C. April 16, 1940.

"Sir: Addressed to the Director, Bureau of War Risk Litigation, U. S. Department of Justice, Washington, D. C.

"Your letter dated April 3, 1940, requesting a certified copy of the records of proceedings of the Summary Courts Martial in the case of Joseph Galloway, formerly seaman, second class, U. S. Navy, has been forwarded to this office by the Chief of the Bureau of Navigation for reply.

"The records of this office show that Galloway was tried by Summary Court Martial on April 30, 1920 for the offense 'Absence from station and duty without leave' on April 26, 1920, for a period of eleven hours. He pleaded guilty and [fol. 185] was sentenced to lose pay amounting to $31.10 and to deprivation of liberty on shore on a foreign station for one month. The proceedings, findings and sentence were approved by the convening authority on May 2, 1920 and by the immediate superior in command on May 11, 1920.

"Galloway was again tried by Summary Court Martial on May 31, 1920, for the offenses 'Absence from station and duty' on May 19, 1920 for three and one-half hours and 'Drunkenness.' He was sentenced to loss of pay amounting to $144 and to a bad conduct discharge. The proceedings, findings and sentence were approved by the convening authority on May 31, 1920 and by the immediate superior in command on June 2, 1920, but the bad conduct discharge was remitted subject to six months probation.

"The records of proceedings of the Summary Courts Martial in Galloway's case are no longer on file, having been destroyed in accordance with the provisions of law. The Navy Department is, therefore, unable to comply with your request."

I will read further portions from Defendant's Exhibit C, covering the enlistment from December 7, 1920 to May 6, 1921.

"Enlist record, Regular Army. Name, Joseph Galloway. Enlisted at Detroit Michigan, December 7, 1920. Last enlisted service in the Army Company D, 8th Machine Gun Battalion, April 29, 1919. Declaration of Applicant:

[fol. 186] "Where were you born? Philadelphia, Pennsylvania.

When were you born? June 29, 1891.
What is your race? White.
What is your regular trade or occupation? Laborer.
Are you a citizen of the United States? Yes.
Are you single, married, widower, or divorced? Single.
How many children have you? None.
Have you ever been convicted of a felony? No.
Have you ever been imprisoned under sentence of a court in a reformatory, jail or penitentiary? No.
Have you ever been discharged from any service, civil or military, except with good character, and for the reasons given by you to the recruiting officer? No.
Have you ever served as an enlisted man in the United States Army, National Guard, Navy, or Marine Corps? Yes.
If so, state last service and date of discharge. April 29, 1919, Company D, 8th Machine Gun Battalion.
Have you ever served as a commissioned officer in these services? No. Are you now a member of the National Guard of any State, Territory, or the District of Columbia? No. Have you ever previously applied for enlistment and been rejected? No.
"Have you found that your health and habits in any way interfere with your success in civil life? No.
If so, give details: No.
[fol. 187] "Do you consider that you are now sound and well? Yes. What illnesses, disease, or accidents have you had since childhood? None. Have you ever had any of the following? If so, give dates: Spells of unconsciousness or convulsions? No. Gonorrhea? No. Have you ever raised or spat blood? No. When were you last treated by a physician, and for what ailment? None. Have you ever been under treatment at a hospital or asylum? None. Do you know that if you secure your enlistment by means of any false statement, wilfull misrepresentation or concealment as to your qualifications for enlistment you are liable to trial by court martial for fraudulent enlistment? Yes. Do you agree to enlist in the Army, unless found to be disqualified, if you are furnished transportation to recruit depot or other place of completion of physical examination? Yes.
"Physical examination at place of enlistment. Height, 65 inches. Weight, 138 pounds. Girth of chest at expiration, 32 inches, at inspiration, 35 inches. General examina-

tion: Physique, skin, head, chest, abdomen, extremities, and so forth, good. Genito-urinary system, normal. Vision, right eye 20/20, left eye 20/20. Eye conditions normal. Hearing: right ear 20/20, left ear 20/20. Mouth and gums: good."

"I certify that I have carefully examined the applicant and have correctly recorded the results of the examina-
[fol. 188] tion; and that, to the best of my judgment and belief, he is mentally and physically qualified for service in the United States Army. E. F. Harrison, Captain. Detroit, Michigan, December 7, 1920.

"Educational Qualifications"

The date is the same date as previously read.

"Main occupation, laborer."

"Record of convictions by courts martial. Summary C. M., appointed by Major General Dickman. 96 Article of War. Appeared upon the streets drunk and disorderly. Sentence as approved: To be confined at hard labor for one month and to forfeit two-thirds of his pay for a like period. Approved January 27, 1921.

"Disorderly—behaved in disorderly and disgraceful manner while detailed as a member of a firing squad in Los Angeles, California. Sentence as approved: To have two-thirds of his pay for two months detained. Approved February 15, 1922."

"August 6, 1921: Dropped as a deserter. Surrendered at San Bernardino, California and returned to military control at March Field, Riverside, California, on November 1, 1921."

Mr. Gerlack: Does it say he deserted on August 6, 1921?

Mr. Dillon: Dropped as a deserter on August 6, 1921.

Mr. Gerlack: The procedure is they hold them A.W.O.L. for several days before they drop them as deserters.

[fol. 189] Mr. Dillon: Well, you can take that up if you can find it.

"Surrendered at San Bernardino, California and returned to military control at March Field, Riverside, California, on November 1, 1921. Restored to duty without trial November 28, 1921 and transferred to C.A.C.

"C.O., Third Company, Los Angeles, Fort MacArthur, California, May 9, 1922. To the Adjutant General of the Army:

"This soldier deserted the service at Fort MacArthur, California, May 6, 1922."

"Report of desertion. Galloway, Joseph. Private, Third Company, Los Angeles. Witnesses as to charge of desertion: Captain Clarence W. Dresser, Third Company, Los Angeles; Sergeant John McGowan, Third Company, Los Angeles."

Mr. Gerlack: What is the date of that?

Mr. Dillon: "absented himself without proper leave on May 6, 1922, and is on this 9th day of May, 1922 dropped as a deserter. Witnesses as to additional offenses: None."

The Government rests, your Honor.

Mr. Gerlack: Just one thing that I just wanted—May I see that A. G. O.? Just one entry:

[fol. 190] "Dropped as a deserter August 6, 1921. Surrendered at San Bernardino, California and returned to military control at March Field, Riverside, California, on November 1, 1921. Restored to duty without trial November 28, 1921 and transferred to Coast Artillery Corps, See fourth indorsement."

That is all.

Mr. Dillon: Your Honor, I would like to make my motion and have the jury excused.

The Court: You may make your motion. I am prepared to rule. There is no necessity for the jury to be excused.

Mr. Dillon: I earnestly request that I be allowed just five minutes.

The Court: Very well. The jury may retire.

(The jury retired.)

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Dillion: Comes now the Defendant and makes its motion for a directed verdict for the reason the plaintiff has failed to establish by substantial evidence that the insured was totally and permanently disabled at the time the insurance herein sued upon was in force and effect.

(Thereupon counsel for the respective parties argued the motion.)

(The jury returned in the court-room.)

The Court: Waive the roll call, stipulating and agreeing all the jurors are in the jury box?

Mr. Dillon: Yes.

[fol. 191] Mr. Gerlack: Yes, Your Honor.

The Court: Members of the Jury, the case now stands submitted. The Court will direct the jury to retire and return a verdict for the Defendant.

Mr. Gerlick: May it please the Court, I don't know if the new rules require that an exception be noted or not, but if it does——

The Court: Let the record show your exception.

Mr. Gerlack: I so note it.

The Court: The jury may retire.

(The jury retired at 10:25 o'clock a. m. and returned at 10:32 o'clock a. m.)

The Court: Waive the roll call, stipulating and agreeing all the jurors are in the jury box?

Mr. Gerlack: Yes, your Honor.

The Court: The jury has a verdict?

(The verdict was handed to the Court.)

The Court: Record the verdict.

The Clerk: Ladies and Gentlemen of the Jury, harken unto your verdict as it will stand recorded:

VERDICT

"We, the jury in the above-entitled case, find in favor of the Defendant. Dated September 12, 1941.

Signed "Janette Lawrence, Foreman."

Mr. Gerlack: May the record show an exception?

The Court: Let the record note an exception.

November —, 1941.

Alvin Gerlack, Attorney for Plaintiff and Appellant.

ol. 192] STIPULATION

It is stipulated that the foregoing is a fair and accurate atement of parts of the Record, proceedings and evidence be included in the record on appeal in the above entitled use.

Dated December 12th, 1941.

Alvin Gerlack, Attorney for Appellant. Frank J. Hennessy, United States Attorney. Thos. G. Lynch, Assistant United States Attorney. Daniel Dillon, Attorney, Department of Justice, Attorneys for Appellee.

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ol. 193] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 26, 1941

Notice Is Hereby Given that Joseph Galloway, by Freda alloway, his guardian, plaintiff above named, by his attorney, Alvin Gerlack, Esq., hereby appeals to the Circuit ourt of Appeals for the Ninth Circuit from the Order of e District Court directing a verdict for the Defendant and ainst Plaintiff, and from the final judgment in favor of e defendant entered in the above entitled cause on the th day of September, 1941.

Dated November 24th, 1941.

Alvin Gerlack, Attorney for Plaintiff.

Receipt of a copy of the within Notice of Appeal is hereby dmitted this 25th day of November, 1941.

Frank J. Hennessy, by W. M., Attorney for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

TIPULATION AND ORDER FOR THE TRANSMITTING OF ALL EXHIBITS INTRODUCED AT THE TRIAL TO THE CIRCUIT COURT OF APPEALS—Filed December 22, 1941

It Is Hereby Stipulated by and between the parties reto through their respective counsel, that all of the exol. 194] hibits introduced at the trial of the above en-

titled cause, including Exhibits marked for Identification, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to Rule 75 (i), Rules of Civil Procedure for the District Courts of the United States, and that the Court may make such order for the transportation, safekeeping and return thereof as it deems proper.

Dated this — day of December, 1941.

Alvin Gerlack, Attorney for Plaintiff. Frank J. Hennessy, United States Attorney; Daniel Dillon, Attorney, Department of Justice, Attorneys for Defendant.

It Is So Ordered This 22nd day of December, 1941.

Martin I. Welsh, United States District Judge.

[File endorsement omitted.]

[fol. 195] In United States District Court

Stipulation as to the Record on Appeal—Filed December 22, 1941

It Is Hereby Stipulated, by and between the parties hereto, through their respective counsel, that the following hereinafter enumerated parts of the record, proceedings and evidence, be included in, and shall constitute, the record on appeal herein pursuant to Rule 75 (f) of the Rules of Civil Procedure for the District Courts of the United States:

1. Complaint,
2. Notice of filing complaint,
3. Affidavit of service of complaint,
4. Answer,
5. Amended Answer,
6. Clerk's minutes of the trial, including Verdict, and Judgment on Verdict; Statement of parts of record, proceedings and evidence to be included in the record on appeal, including medical findings, diagnoses, etc. read into the record from Army, Navy and Veterans Administration reports, including Plaintiff's Exhibits 1-A (for identification-, 1-B (for identification), 1-C (for identification), 1-D (for identification), 1-E (for identification), 1-F (for iden-

tification), 1-G (for identification), and Defendant's Ex-
[fols. 196-198] hibits A, B, C, D, E, and F; also including pertinent parts of all depositions read into evidence at the trial of said cause,

7. Notice of Appeal,

8. Stipulation and Order for Transmitting all Exhibits to the Circuit Court of Appeals,

9. Stipulation and Order that exhibits need not be included in the record on appeal but may be incorporated by reference,

10. Stipulation designating the contents of the record on appeal,

11. Certificate of Clerk authenticating the record.

Dated December 19th 1941.

Frank J. Hennessy, United States Attorney; Daniel Dillon, Attorney, Department of Justice, Attorneys for Defendant; Alvin Gerlack, Attorney for Plaintiff.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 199] In Northern Division of the United States District Court, Northern District of California

[Title omitted]

Order Extending Time to File the Record on Appeal and to Docket the Cause—Filed January 3, 1942

Good Cause Appearing Therefore,

It Is Hereby Ordered that the time within which to file the record on appeal and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 1st day of February, 1942.

Dated this 3rd day of January, 1942.

Michael J. Roche, United States District Judge.

O. K. W. E. Licking, Asst. U. S. Atty.

[File endorsement omitted.]

[fol. 200] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 201] In United States Circuit Court of Appeals for the Ninth Circuit

Joseph Galloway, by Freda Galloway, His Guardian, Appellant,

vs.

United States of America, Appellee

Stipulation Designating the Record Necessary for the Consideration of the Appeal Herein

It Is Hereby Stipulated by and between the parties hereto through their respective counsel, pursuant to Rule 19, subdivision 6 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, that the record as designated in the stipulation filed in the District Court on the 22nd day of December, 1941, dated the 19th day of December, 1941, and each and every part thereof, shall be and is hereby designated as the parts of the record necessary for the considera-
[fol. 202] tion of the appeal herein.

Dated this 19th day of December, 1941.

Alvin Gerlack, Attorney for Appellant; Frank J. Hennessy, United States Attorney for the Northern District of California; Daniel Dillon, Attorney, Department of Justice.

[fol. 203] In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Statement of Points upon Which Appellant Intends to Rely on Appeal Herein

The appellant herein and the appellee having by stipulation designated the parts of the record necessary for the consideration of the appeal herein, the said appellant hereby designates the points upon which he intends to rely upon the appeal herein as follows:

1. That the trial court erred in granting the defendant's motion for a directed verdict, for the reason that plaintiff produced sufficient substantial evidence that plaintiff became totally and permanently disabled while his contract

of insurance was in force and the case should have been sub-
[fol. 204] mitted to the jury for its consideration on the merits.

2. That the trial court erred in ordering judgment to be entered on the verdict.

Dated December 8th, 1941.

Alvin Gerlack, Attorney for Appellant.

Receipt of a Copy of the Within Statement of Points is Hereby Admitted this 8th day of December, 1941.

Daniel Dillon, Atty. Dept. of Justice Attorney for Appellee.

[fol. 205] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

STIPULATION AND ORDER THAT CERTAIN VOLUMINOUS EXHIBITS NEED NOT BE COPIED IN THE RECORD BUT MAY BE INCORPORATED BY REFERENCE—Filed January 12, 1942

It Is Hereby Stipulated with the approval of the Court, by counsel for the respective parties herein, that in addition to the record on appeal heretofore agreed upon, the hereinafter enumerated original exhibits, pertinent parts of which were introduced at the trial of the above entitled cause, and which said exhibits now constitute a part of the record on appeal, may be incorporated in and made a part of the appeal by reference only without the necessity of printing such exhibits, said exhibits being specifically enumerated [fol. 206] as follows:

Plaintiff's Exhibits 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, and 1-G for Identification;

Defendant's Exhibits A, B, C, D, E, and F.

Dated this 19th day of December, 1941.

Frank J. Hennessy, United States Attorney; Daniel Dillon, Attorney, Department of Justice, Attorneys for Appellee; Alvin Gerlack, Attorney for Appellant.

It Is So Ordered this 12 day of January, 1942.

Curtis D. Wilbur, Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[File endorsement omitted.]

[fol. 207] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ORDER PERMITTING APPELLANT TO FILE TYPEWRITTEN RECORD AND BRIEFS—January 12, 1942

Upon consideration of the application of Joseph Galloway by Freda Galloway, his guardian, and of the affidavit of Freda Galloway, in support thereof, for relaxation of Rules 19 and 20 of the Rules of this Court, to permit appellant to prosecute his appeal to this Court upon typewritten record and typewritten briefs, and good cause therefor appearing,

It Is Ordered that said application be, and hereby is granted, and that the provisions of Rules 19 and 20 of the Rules of this Court requiring the printing of the transcript of record and briefs be, and hereby are relaxed, and appellant be, and he hereby is permitted to file four clear legible copies of the transcript of record and briefs in typewritten form, upon paper 8 x 10½" and bound on the left margin.

[fol. 208] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ORDER OF SUBMISSION—March 18, 1942

Ordered appeal herein argued by Mr. Alvin Gerlack, counsel for appellant, and by Mr. Thomas Lynch, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

[fol. 209] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—September 1, 1942

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 210] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10,023

Sept. 1, 1942

JOSEPH GALLOWAY, by FREDA GALLOWAY, his guardian, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Before: Garrecht and Haney, Circuit Judges, and St. Sure, District Judge.

OPINION—Filed September 1, 1942

GARRECHT, Circuit Judge:

Joseph Galloway entered the United States Army in November, 1917, and was honorably discharged April 29, 1919. On or about February 1, 1918, Galloway applied for, and was granted, a policy of war risk insurance in the face amount of $10,000, on which he paid the premiums to include the month of April, 1919, and which finally lapsed for non-payment of premium on May 31, 1919. On February

11, 1932, Freda Galloway, wife of Joseph Galloway, was granted letters of guardianship over the person and estate of Joseph Galloway by the Superior Court of the State of California. Claim for insurance benefits was made to the Veterans Administration in June, 1934, and was denied. Joseph Galloway, by his guardian, filed action in the court below alleging that while in the service of defendant the plaintiff contracted "injuries, diseases and disabilities," which have rendered him unable to follow continuously any substantial occupation and that such condition reasonably is certain to continue throughout plaintiff's lifetime. He prayed judgment for the monthly installment benefits in accordance with the terms of the contract. The defendant's answer denied the essential allegations of the complaint; issue was joined, trial was had before a jury, and upon [fol. 211] motion of defendant's counsel for a directed verdict in its favor, the motion was granted. The jury returned a verdict in favor of defendant, pursuant to instructions, and judgment was entered in accordance therewith. The plaintiff appeals from this judgment, raising but one question for our consideration, namely, whether the trial court erred in directing a verdict for the defendant.

It appears from the record that after entering the armed forces Galloway was transported to France with the other members of his unit; that he was a cook; that shortly after arriving in France Galloway caused a disturbance in his camp late one night by shouting, "screeching," and swearing; that he became nervous and quarrelsome; that in June, 1918, while standing guard with other soldiers on the left bank of the Marne River in France in the night time, Galloway screamed, "The Germans are coming"; that on this occasion his fellows seized and gagged him; that the Germans were not attacking at the time, nor was there any action then at all. It was testified that at that time Galloway appeared out of his mind—insane. The deposition of one John J. O'Neill was read into evidence in behalf of the plaintiff. O'Neill stated that he was a boyhood chum of Galloway's in Philadelphia; that he was closely associated with Galloway prior to the latter's entrance into the Army and after his discharge; that he first saw Galloway, after discharge, in April or May, 1919, in Philadelphia in their old neighborhood, and Galloway was wearing his Army uniform; that he noted a marked change in the man; that he observed Galloway had crying spells, imagined friends

were enemies, would brood, and was moody; that at other times the veteran would appear and act normally; that he had seen Galloway spit blood.

During the course of the trial it was brought out that Galloway had been convicted under summary court martial for violation of Article of War 61 (absence without leave) and was sentenced (approved Feb. 2, 1918) to hard labor for two months and forfeiture of two-thirds pay per month for the two months. Galloway enlisted in the United States Navy January 15, 1920, and on July 8, 1920, was separated from service with a bad conduct discharge, in accordance with the sentence of a summary court-martial, which sentence was approved June 2, 1920. He was also court-martialed by a Navy court on April 30, 1920, for "absence from [fol. 212] station and duty without leave," to which charge he pleaded guilty; the charge which caused his discharge from the Navy was for a similar offense on May 19, 1920, and for "drunkenness." It is not entirely clear from the record whether the bad conduct discharge was remitted. On December 7, 1920, Galloway enlisted in the United States Army for a second time, following his intervening enlistment in the Navy, and deserted the service May 6, 1922. At no time during either of the two latter enlistments did Galloway make application for war risk insurance.

An Army chaplain who ministered spiritually to the patients at the Fort MacArthur Station Hospital, San Pedro, California, in 1920, 1921, and 1922 testified by deposition in behalf of the plaintiff. The witness stated that Galloway came to his attention early in 1920 when Galloway was a patient for some six weeks in the mental ward at the Fort hospital: that Galloway was then under restraint as a prisoner, for having violated either the 58th (desertion) or the 61st (absence without leave) Article of War; that he believed Galloway was then "mentally deranged" because he was usually abnormally depressed; that Galloway manifested no interest in anyway except his own problems; that he (Galloway) believed he was being mistreated; that the witness believed Galloway was irrational. The chaplain said that while he did not consider himself an expert, he had been intensely interested in the study of mental cases, had observed hundreds of such cases, and had read widely on the subject. Cross-examination brought out that Galloway was an enlisted man in the Navy early in 1920, and on re-

direct the chaplain admitted that the year might have been 1921 or 1922, although to the best of his recollection, he believed the year to be 1920.

The deposition of another witness was introduced or read in evidence by the plaintiff—the executive officer of a ship to which Galloway was attached during his enlistment in the Navy. This witness testified that he recalled an enlisted man named Galloway who was aboard ship and who was not amenable to discipline, who caused considerable trouble by disobedience and by leaving the ship without permission, and who was given a bad conduct discharge.

The plaintiff also introduced a deposition of the commanding officer of the Company in which Galloway served for a period during his second enlistment in the Army; this [fol. 213] deposition had been taken at the instance of the Government, but was introduced in evidence by the plaintiff without objection. This witness said that he found it necessary to discipline Galloway and concluded he was not dependable; that Galloway drank considerably; that he was a disturbing influence in the Company; that he was convicted by summary court martial for being drunk and disorderly; that Galloway exhibited excessive cheerfulness at times, and at other times, lifelessness or depression; that the witness did not consider Galloway insane in any respect.

A medical witness for the plaintiff testified in his behalf. This witness first saw and examined Galloway a few weeks prior to the trial and testified that Galloway was insane, suffering from "a schizophrenic branch or form of praecox." After discussing the plaintiff's symptoms, reviewing parts of the evidence, having read to him reports of physical and mental examinations of Galloway in 1930 and 1934, the doctor expressed the opinion that Galloway was insane in June or July, 1919, and, as well, in April or May, 1919, and at all times since July, 1918.

After the conclusion of the plaintiff's case the defendant introduced as a witness the Master Sergeant of the Company in which Galloway served in the latter part of 1920 and early in 1921. This witness stated that he remembered Galloway as a member of his Company; that Galloway drank occasionally; that he was court-martialed for drunkenness; that his actions appeared those of a normal man; that he was dependable and not unduly quarrelsome; that there was no indication to the witness that Galloway might have been insane. When Galloway was discharged from

the Navy in 1920, he was given a physical examination, which examination indicated that he had no disabilities. The deposition of the Navy doctor who examined the plaintiff was read in evidence and revealed that the doctor found Galloway was without disability; that Galloway stated to the doctor that he had no war risk insurance; that the doctor discovered no mental defects; that Galloway's conduct was not unusual; that if any defects were apparent, he would have noted them.

It was brought out by the defense that Galloway was married February 14, 1929, which was nearly ten years after his discharge from his first enlistment. It also appeared that at the time of his second enlistment in the Army in December, 1920, Galloway declined to apply for war risk insur- [fol. 214] ance. From September 24, 1918, to January 3, 1919, Galloway had been confined to a base hospital by reason of an attack of influenza. At the time of discharge at the conclusion of his first enlistment Galloway stated that he had no reason to believe he was suffering from the effects of any wound, injury, or disease, or from any disability or impairment of health. The certificate of the examining surgeon, dated April 28, 1919, stated that Galloway had been given "a careful physical examination and it is found that he is physically and mentally sound." At his discharge from the Navy in July, 1920, the plaintiff was examined and "found to be free from all physical disabilities." He was given a complete physical examination prior to his second enlistment in the Army, on December 7, 1920, and was found "mentally and physically qualified."

Following this presentation the counsel for defendant moved for a directed verdict, which was granted, as heretofore noted.

The extent of our inquiry in a case such as this is stated in United States v. Holland, 9 Cir., 111 F 2d 949, 952-953:

"• • • It was necessary for the plaintiff to prove, by a fair preponderance of the evidence, that he became totally permanently disabled within the life of the policy, • • •. This burden is not carried by leaving the evidence in the realm of speculation. If the testimony leads as reasonably to one hypothesis as to another, it tends to establish neither. • • • A Federal court is not permitted to submit a case to a jury on probabilities or a mere scintilla of evidence, but there must be some substantial evidence offered by the plaintiff to justify submission of the case to the jury. • • •

In the examination of this question we are not to weigh the evidence; what our verdict would have been as jurymen is immaterial; it is likewise immaterial that the court may be of opinion that the evidence preponderates in favor of the party making the motion—the responsibility of weighing the facts is the jury's. * * * We must assume as established, however, all the facts that the evidence supporting plaintiff's claim reasonably tends to prove, and there should be drawn in his favor all the inferences fairly deducible from such facts. * * *"

To meet the requirement that the plaintiff "must show, by evidence contemporaneous with the life of the policy, the then totality and permanence of his disability," (Wise [fol. 215] v. United States, 5 Cir., 63 F2d 307, 308; Cunningham v. United States, 5 Cir., 67 F2d 714, 715) the plaintiff offered the testimony of three persons, two of them by deposition. Two of the witnesses were comrades in arms, and each testifies to isolated incidents wherein it is said Galloway did not behave in a rational manner. But it is obvious that an instance or two of hysteria or uncontrolled emotion during a period of tension is not proof of total permanent disability by reason of insanity. Similarly, observation by a friend, even of long standing, of the plaintiff's conduct upon return from service, given many years later, and in the knowledge of the present condition of the veteran, is not proof of the total permanent disability of the insured at a period when the policy was in force. This is an example of "the danger of confusing a later condition with an earlier one." United States v. Brown, 1 Cir., 76 F2d 352, 353. Moreover, no matter how accurate the medical expert's diagnosis of the present condition of the plaintiff, his opinion respecting the totality and permanency of Galloway's disability, if such existed, in April, 1919, amounts to what has been termed a "long range retroactive diagnosis," and rests upon inference and probabilities. "There is nothing in plaintiff's evidence as to his condition when his policy lapsed which affords more than a basis for surmise, speculation, and conjecture that he was totally and permanently disabled then. Verdicts of juries must have something more firm to rest on than this." United States v. Sandifer, 5 Cir., 76 F2d 551, 554.

It is an accepted rule that if the evidence presented by a party is positively contradicted by the physical facts, neither

the court nor the jury is permitted to give it credence. Deadrich v. United States, 9 Cir., 74 F2d 619, 622. If the testimony introduced here by the plaintiff were contradicted by the physical facts, the trial judge was bound to direct a verdict for defendant. In Atkins v. United States, Ct.Ap.-D.C., 70 F2d 768, 771, the plaintiff had re-enlisted in the Army subsequently to the expiration or lapsation of his policy of war risk insurance. Affirming a judgment for defendant, the appellate court said, "It is inconceivable that he could have been accepted for this service had he not been reasonably sound in body and mind." In a similar case, United States v. Le Duc, 48 F2d 789, 793, the Circuit Court of Appeals for the Eighth Circuit used this emphatic language:

"• • • He was twice re-enlisted in the United States Army, passing the medical examinations required, and the [fol. 216] statute provides that only able-bodied men shall be permitted to enlist. This proof conclusively precludes the plaintiff from contending that the disability acquired while in the service was permanent. • • •"

We believe that the plaintiff's two enlistments subsequent to the lapse of his policy, and his period of service in the Navy and in the Army, are such physical facts as refute any reasonable inferences which may be drawn from the evidence here presented by him that he was *totally* and *permanently* disabled during the life of his policy. Another failure in appellant's case is the utter lack of any evidence at all respecting Galloway's work record between his last discharge from the Army and the appointment of a guardian over him, a period of nearly ten years. It must be remembered, also, that Galloway married in 1929, long after he is claimed to have become totally and permanently disabled by reason of insanity. In our discussion we have assumed that Galloway has been totally permanently disabled since February 11, 1932, the date of the appointment of the guardian.

Counsel for appellant has ably presented this case, but its inherent weakness, even when considered in its most favorable aspects, requires that the direction of a verdict for defendant by the court below be sustained.

The judgment is affirmed.

[File endorsement omitted.]

[fol. 217] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10023

JOSEPH GALLOWAY, by FREDA GALLOWAY, his guardian, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—Filed and entered September 1, 1942

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[fol. 218] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 219] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 553

ORDER ALLOWING CERTIORARI—Filed January 4, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,054, U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 553. Joseph Galloway, by Freda Galloway, His Guardian, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed November 28, 1942. Term No. 553 O. T. 1942.

(4197)

FILE COPY

Petition not printed

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 553

JOSEPH GALLOWAY, BY FREDA GALLOWAY, HIS GUARDIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF.

WARREN E. MILLER,
ALVIN GERLACH,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 553

JOSEPH GALLOWAY, BY FREDA GALLOWAY, HIS GUARDIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF.

Opinion Below.

There is no opinion by the District Court at the time it granted defendant's motion for directed verdict (R. 12).

The opinion of the Circuit Court of Appeals (R. 135, 141) is reported in 130 F. 2d 467.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered September 1, 1942 (R. 142). The petition for the

writ of certiorari was filed November 28, 1942, and granted January 4, 1943.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether the Circuit Court of Appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment of the Federal Constitution in determining that there was no evidence upon which the jury might find petitioner totally and permanently disabled, thus usurping the functions of the jury by invading its province.

Provisions of the Constitution, Statutes and Regulation Involved.

The Seventh Amendment to the Federal Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protections for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total perma-

> nent disability of any such person in any multiple of $500 and not less than $1,000 or more than $10,000, upon payment of the premiums as hereinafter provided.

This section was restated in substance in subsequent amendments (U. S. C., Title 38, Sec. 511; U. S. C., Sup. VII, Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918, "permanent and total disability" was defined as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> "Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *"

Title 28, U. S. C. A., Supp. Section 445 provides:

> "In the event of disagreements as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

Statement.

The petitioner filed suit (R. 1-5) against the United States upon the War Risk Term Insurance contract of Joseph Galloway, hereinafter referred to as the insured, for total and permanent disability benefits under the terms

of his said contract of insurance, claiming benefits (R. 3) from April 29, 1919, in the amount of $57.50 per month.

At the conclusion of the evidence, respondent moved for a directed verdict (R. 12) whereupon the Court instructed the jury to return a verdict in favor of the respondent. Petitioner appealed.

The United States Circuit Court of Appeals for the Ninth Circuit, in the decision now being reviewed (R. 135-141), reported in 130 F. 2d 467, held that the evidence of the petitioner, when considered in its most favorable aspects, required the direction of a verdict in favor of respondent.

Argument.

The evidence, when considered in its most favorable aspects, required the submission of this case to the jury as there was a substantial evidence that the insured was totally and permanently disabled prior to May 31, 1919 (R. 15).

For the convenience of the Court, reference is made in the appendix of this brief to the substantial testimony of plaintiff's seven witnesses, segregated in time sequence.

The latest pronouncements of this Court in similar cases are set forth in the cases of *Halliday* v. *United States*, 315 U.S. 94, 62 S.Ct. 438, 86 L.Ed. 393, and *Berry* v. *United States*, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945.

In *Halliday* v. *United States*, as in this case, the insured was insane. The facts in that case, while strikingly similar to the facts in the case at bar, are not nearly as strong as the facts here. There, total and permanent disability was claimed from April 2, 1919, and here it is claimed from a date prior to May 31, 1919 (R.15).

In the Halliday case until as late as 1924, no diagnosis of mental or nervous disorder was made and no irrational

act was noted. And as late as 1924, a searching examination resulted in a definite finding that there was no neuropsychiatric disability. In the instant case, there are numerous irrational acts noted by witnesses who related them, occurring while this insurance was in force.

In the Halliday case the insured was found to be mentally competent following observation in a mental hospital after a period of thirty days in 1936, having been adjudicated incompetent in 1935. While here, even the Court below (R.141) assumed that the insured has been totally and permanently disabled since February 11, 1932, the date of the appointment of the guardian.

In the *Halliday* case the respondent urgede that the opinion testimony of Halliday's physician had no probative force and urged this Court that it was without foundation and opposed to the undisputed facts. This Court, however, recognized the doctor's testimony in the Halliday case. Here, the testimony of the physician, which was not contradicted by any other testimony, showed that this man was insane in April or May 1919 (R. 96, 97) and a witness who served with him in France testified that he was out of his mind and appeared insane (R. 46) in June 1918.

In their opinion, the Court below says:

> "• • • To meet the requirement that the plaintiff 'must show, by evidence contemporaneous with the life of the policy, the then totality and permanence of his disability,' (*Wise* v. *United States*, 5 Cir., 63 F. 2d 307, 308; *Cunningham* v. *United States*, 5 Cir., 67 F. 2d 714, 715) the plaintiff offered the testimony of three persons, two of them by deposition. Two of the witnesses were comrades in arms, and each testifies to isolated incidents wherein it is said Galloway did not behave in a rational manner. But it is obvious that an instance or two of hysteria or uncontrolled emotion during a period of tension is not proof of total permanent disability by reason of insanity. Similarly, ob-

servation by a friend, even of long standing, of the plaintiff's conduct upon return from service, given many years later, and in the knowledge of the present condition of the veteran, is not proof of the total permanent disability of the insured at a period when the policy was in force. This is an example of 'the danger of confusing a later condition with an earlier one.' *United States* v. *Brown*, 1 Cir., 76 F. 2d 352, 353. Moreover, no matter how accurate the medical expert's diagnosis of the present condition of the plaintiff, his opinion respecting the totality and permanency of Galloway's disability, if such existed, in April, 1919, amounts to what has been termed a 'long range retroactive diagnosis', and rests upon inference and probabilities."

It will thus be seen that after weighing the substantial evidence consisting of the testimony of these witnesses, the Circuit Court of Appeals discarded it, which action petitioner claims was not only erroneous and deprived petitioner of his right to a jury trial as granted by our Constitution, but was also contrary to the previous decision of this Court in *Halliday* v. *United States*.

The remarks of this Court with reference to total permanent disability in the strikingly similar case of *Halliday* v. *United States* are believed applicable here.

> "*While it is true that total and permanent disability prior to the expiration of the insurance contract must be established, evidence as to petitioner's conduct and condition during the ensuing years is certainly relevant. It is a commonplace that one's state of mind is not always discernible in immediate events and appearances, and that its measurement must often await a slow unfolding. This difficulty of diagnosis and the essential charity of ordinary men may frequently combine to delay the frank recognition of a diseased mind.* Moreover, the totality and particularly the permanence of the disability as of 1920 are susceptible of no better proof than that to be found in petitioner's personal history for the ensuing 15 years." (Italics supplied.)

In their decision the Court below says:

> "We believe that the plaintiff's two enlistments subsequent to the lapse of his policy, and his period of service in the Navy and in the Army, are such physical facts as refute any reasonable inferences which may be drawn from the evidence here presented by him that he was *totally* and *permanently* disabled during the life of his policy. Another failure in appellant's case is the utter lack of any evidence at all respecting Galloway's work record between his last discharge from the Army and the appointment of a guardian over him, a period of nearly ten years. It must be remembered, also, that Galloway married in 1929, long after he is claimed to have become totally and permanently disabled by reason of insanity. * * *"

In this respect this Court in the *Halliday* case, *supra*, says:

> "In support of its conclusion the Circuit Court of Appeals observed that 'insured's failure to secure adequate hospitalization' leaves it 'highly speculative whether insured's ailments, whatever these may have been, would not have been cured by the medical treatment which was in his potential grasp.' There can be no doubt that evidence of the failure of attempted treatment would have been highly persuasive of the permanence of petitioner's disability. And the jury was entitled to draw inferences unfavorable to his claim from the absence of such evidence. However, this was but one of the many factors which the jury was free to consider in reaching its verdict. In the face of evidence of a mental disorder of more than 15 years duration it can hardly be said that the absence of this single element of proof was fatal to petitioner's claim. Moreover, inferences from failure to seek hospitalization and treatment must be drawn with the utmost caution in cases of mental disorder, where, as here, there is reason to believe that one of the manifestations of the very sickness itself is fear and suspicion of hospitals and institutions."

It is submitted that the foregoing language of this Court in the *Halliday* case is applicable by analogy to the instant case.

This Court, in *Berry* v. *United States*, 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945, clearly states the rule as to what constitutes total permanent disability, as follows (61 S. Ct. 637, 639):

> "It was not necessary that petitioner be bed-ridden, wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was totally and permanently disabled. It cannot be doubted that if petitioner had refrained from trying to do any work at all, and the same evidence of physical impairment which appears in this record had been offered, a jury could have properly found him totally and permanently disabled. And the jury could have found that his efforts to work—all of which sooner or later resulted in failure—were made not because of his ability to work but because of his unwillingness to live a life of idleness, even though totally and permanently disabled within the meaning of his policies. Nor does the fact that he waited thirteen years before bringing suit stand as an insuperable barrier to his recovery. His case was not barred by any statute of limitations. • • •"

The Circuit Court in their decision fail to maintain either the *Berry* or *Halliday* cases, although vehemently stressed by petitioner's counsel before that Court.

The Circuit Court has completely ignored the basic rule reiterated by this Court in *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721, to the effect that the jury are the sole and exclusive judges as to the creditability, weight, and effect of the evidence, and by their decision have on the contrary sought to evaluate petitioner's evidence and to resolve conflicts in the same, contrary to all decisions of this Court, as well as their own decisions. See *Gunning* v. *Cooley, supra; United States* v. *Dudley*, 64 F. (2d) 745

(C. C. A. 9); *United States* v. *Burke*, 50 F. (2d) 653; *United States* v. *Lesher*, 59 F. (2d) 53.

Competent witnesses testified without objection, that petitioner at the crucial time (1918 and since) was insane, (R. 44-46, 99). That a lay witness can testify as to the sanity or insanity of a person has long been established. *Connecticut Mutual Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 4 S. Ct. 533; 28 L. Ed. 536; *Corrigan* v. *United States*, 82 F. (2d) 106 (C. C. A. 9), *United States* v. *Woltman*, 57 Fed. (2d) 418 (App. D. C.)

We have here direct positive evidence of John J. O'Neill who stated his observations of the insured in April or May of 1919, and also we have the opinion of Doctor E. M. Wilder, a recognized psychiatrist who (R. 96-97) stated that the insured was insane in April or May of 1919, assuming that the observations of the witness, O'Neill, were true. Doctor Wilder testified (R. 109) that the probability is the insured will be insane for the rest of his life. This mental condition has existed since prior to the lapse of the insured's contract which occurred May 31, 1919.

It was aptly stated by a Federal district judge, in a war risk insurance case (*McGovern* v. *United States*, 294 Fed. 108, affirmed 299 Fed. 302, Cert. dis. 267 U. S. 608):

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

This petitioner was denied by the Court of Appeals the most favorable inferences which should be drawn from this testimony. Clearly, the court below placed upon this testimony inferences most favorable to the defendant below and substituted its opinion in weighing the facts for that of the jury, thus violating the 7th Amendment, and the rule enunciated by this Court in *Gunning* v. *Cooley, supra.*

As was said by the court in *United States* v. *Newcomer*, 78 F. (2d) 50, where there was a substantial work record:

> "* * * His mental condition prevents him from working as other human beings work. He is not monarch of his mind. There is lack of coordination between his mind and his body, and as said by us in Asher v. United States (C. C. A. 8) 63 F. (2d) 20, 23:
>
> "'True, the record shows that insured has been able to do some work. He could do some work like the ox of the field, when guided and directed, but not as an intelligent human being. * * *'"

The weight to be accorded this testimony was for the jury to pass upon. Here every element which is usually pointed out in opinions as making against the claim of total and permanent disability is absent; those which make for it, present.

Upon admitted facts, if reasonable men might differ as to whether the insured was totally and permanently disabled the question was for the jury. Here facts were in dispute which were assumed by the Court below less favorable to petitioner than the evidence warranted.

Conclusion.

It is respectfully submitted that for the reasons stated herein the judgment of the Circuit Court of Appeals holding that there was not substantial evidence of total and permanent disability should be reversed.

Respectfully submitted,

ALVIN GERLACK,
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Washington, D. C.,
Counsel for Petitioner.

APPENDIX.

Period prior to May 31, 1919:

John J. O'Neill, 53 years of age, who worked with the insured, before he was granted insurance, as a steel boat worker, and before the insured entered the Service (R. 20), testified the insured then was the picture of health and there was nothing wrong with him mentally.

John Tanikawa, who served in the same squad with the insured, going overseas and thereafter, testified (R. 42): He became nervous after reaching France, was irritable, and picked fights with other soldiers which was a different condition than was observed before he left the United States.

He was sentenced by summary court martial February 2, 1918, (R. 121) to be confined at hard labor for two months and forfeit two-thirds of his pay each month.

Walter J. Wells, who served with him (R. 32) heard him hollering, screeching, swearing and causing a disturbance late one night in April, 1918, shortly after arriving in France.

In June 1918, late one night while serving with his Machine Gun Squad on outpost duty, facing the Germans on the banks of the Marne River in France, he became violently insane (R. 44) making it necessary for the other soldiers of his squad to gag him so that he would not give their position away to the Germans on the opposite side of the river. His lieutenant suffered a black eye when he attempted to quiet him (R. 40).

That night, however, one couldn't talk to him, Tanikawa testified, because he was out of his mind (R. 46) and appeared to be insane. Thereafter he was court-martialed (R. 45).

He would disobey his officers and during the Argonne battle he "acted queer" (R. 45).

This behavior, Dr. E. M. Wilder, a recognized neuropsychiatrist, testified showed a typical case (R. 98) of acute hallucinations and elusions derived from a typical case of dementia praecox. From an occupational standpoint (R. 99), assuming the facts in evidence to be true, the insured

was insane since July 1918 and unable to adapt himself, this witness testified.

He was admitted to receiving hospital September 24, 1918, remaining there 101 days because of influenza (R. 121).

At time of discharge on April 28, 1919 (R. 122), he was apparently only given a physical examination. A proper inference is that he was not given a mental or neuropsychiatric examination at this time, as the medical examiner only certified that he gave the insured "a careful physical examination."

Period after May 31, 1919:

In April or May 1919 when the insured returned home from service after the World War, John J. O'Neill, a neighbor, and lifelong friend, observed that (R. 17) the insured "was a wreck compared to what he was when he went away" and that his mind appeared to be unbalanced.

Mr. O'Neill testified further (R. 17):

"* * * he would get off in a corner by himself and he would get like crying spells. Another time you would meet him and he would appear to be all right. He would talk sensible, the same as anybody else would maybe the next day or for a couple ow days, and then he would go off and wander again with a lot nonsensical talk. For instance, you would be talking to him and we would try to cheer him up, and one thing and another, and there would be a couple of fellows across the street that would do anything for him, good friends of his, and he would be talking about them, that they wanted to beat him up when they got a chance, and that kind of nonsense."

He would walk over to the curb (R. 18) and spit blood and say "There is that gas". This was observed a dozen times. And this witness observed him every day during 1919 after he returned from the Service. He would try to get the insured out of his mood but he would observe him sitting in a back room crying, after he had been home a couple of months in the early part of 1919. The insured would curse and swear and say "I must be a Dr. Jekyll and Mr. Hyde". He would cry for a couple of hours (R. 19).

Mr. O'Neill testified (R. 19) that the insured had an idea later, about two years, that Grover Bergdoll was a friend of his and that he wanted to get in touch with him in reference to the pot of gold that Bergdoll told the Government he had hidden.

This witness testified that for the five years following the insured's return from the Service (R. 19) that there would be as many as three or four days a week when the insured would keep himself clean and carry on ordinary conversation, but then "there would be a couple of days when evidently his mind would drift and he would splabber around the mouth here and he didn't bother shaving or nothing." These periods were irregular, sometimes two days one way and then two days another. "Sometimes he would go for a couple of months all right" (R. 20). Sometimes he was competent and sometimes he was not during the time that Mr. O'Neill saw him (R. 21). When the insured first returned from the Service he "would go a few days, a little off, and then a few days himself" (R. 21).

Mr. O'Neill distinctly remembered the contrast between the insured's condition when he returned and when he went away (R. 24) and he saw the insured very often. The witness heard a rumor that the insured reenlisted in either the Army or the Navy (R. 25) but he did not see how that would be possible on account of insured's mental condition.

Mr. O'Neill stated that during the five years following April or May, 1919, the insured at times would not appear to be in a normal mental condition (R. 27). And that the insured's mental condition was clearly impressed upon him due to the great contrast in his conduct. As he expressed it, "sometimes he would be totally off his mind" (R. 29).

The witness stated that the first impression he had of the insured when he reurned from the Service was "He was in a fog. The next day he was terrible. We thought then that he would never be right, and then after that he straightened up for a few days, and then he would vary."

Dr. E. M. Wilder (R. 96, 97) stated that assuming Mr. O'Neill's observations to be true, after the insured first came back from France, in April or May 1919, he was then insane.

The insured entered the Navy on January 15, 1920, although apparently not given a mental examination at that time (R. 122, 123). He was then courtmartialed April 30, 1920, for being absent from his station and duty without leave and was then given a bad conduct discharge from the Navy on May 19, 1920.

An officer who observed him during this period of service, Commander Comfort B. Platt, stated (R. 57):

"I recall that he caused considerable trouble to the Commanding Officer by disobedience of orders and jumping ship and matters along that line. After repeated warnings and punishments, leading to court martials I believe he was finally sentenced by a summary court martial for a bad conduct discharge from the U. S. Navy."

This witness further stated that the insured was not amenable to discipline and received a bad conduct discharge.

Colonel Albert K. Mathews, Chaplain, U. S. Army, noticed while the insured in 1920 was a patient in the mental ward at the Fort MacArthur Hospital, he was mentally deranged and would usually be found abnormally depressed and then excitedly launch into a discussion of what, to his understanding, was discrimination on the part of the military authorities in failing to give him a disability discharge. It was difficult to divert his mental processes during these conversations.

At the time this witness first met the insured he was a prisoner in the mental ward of the hospital "by reason of the fact that he was under charges of violation of either the 58th Article of War, which concerns desertion, or the 61st Article of War, which concerns absence without official leave," and was also under mental observation (R. 50).

At that time while confined both as patient and prisoner, insured seemed to have no interest in army life in general, and had no apparent interest in anything outside of his own claim, (R. 51) and could not apparently concentrate on any other subject (R. 52). A mental breakdown was indicated because of his feeling that he was being mistreated to the point of martyrdom; this without any justi-

fication in fact (R. 52). The insured had the general appearance of one mentally exhausted (R. 52).

Colonel Mathews stated that he had observed the insured in the early part of 1920, (R. 53) and then he considered him to be irrational (R. 53), and of unsound mind (R. 56).

Dr. E. M. Wilder (R. 99) stated that assuming Colonel Mathews' observations to be correct, that the insured was definitely insane in 1920.

The insured reenlisted in the United States Army December 7, 1920. At that time he was given a general physical examination (R. 126) and the Army Captain who made the examination stated that he correctly recorded the results of the examination but his recordation thereof does not show that the insured was given a mental examination at that time, although the Captain signed a statement that he was mentally and physically qualified for service.

He was courtmartialed for misconduct January 27, 1921, and then on August 6, 1921, he was dropped from the rolls as a deserter. He was then restored to duty without trial November 28, 1921, having surrendered to military authorities on November 1, 1921.

Lt. Colonel James E. Matthews, U. S. Army, the insured's commanding officer in the first part of 1921, stated that during the summer of 1921 (R. 72, 73) the insured was so undependable that it was necessary to discipline him; and he received a summary court martial because of his misconduct.

Lt. Colonel Matthews further stated that at times the insured smelled of liquor and at other times when he could not smell liquor, it was believed the insured was using dope (R. 76). The insured seemed to believe he was not treated fairly, and could not be depended upon, would be absent from reveille, at times would talk incoherently (R. 78), would have alternate periods of excessive cheerfulness and rather lifelessness (R. 79). Men in his company feared him because he would fight; and he was considered a bad influence (R. 79). This witness further stated (R. 80) that "he acted just like I had noticed other men that I know to be addicts to drugs".

Dr. E. M. Wilder, stated (R. 110) that his desertions from the Service and other conduct showed he was guided purely by personal desires, without any thought of the bearing of his conduct on the outside world (R. 110).

The physical examination report of the Veterans Bureau at San Francisco, California, May 10, 1930, (R. 84, 85) stated in its conclusion that insured was "Moron, low grade; observation, dementia praecox, simple type," which Dr. E. M. Wilder stated means that he was a man of limited mentality, and that the report recommended further observation for a diagnosis of dementia praecox.

The Report of Neuropsychiatric Examination at Palo Alto Hospital, California, dated November 16, 1931, stated that "It is practically impossible to get any definite information from patient." (R. 85), and further that there was tremor of extended fingers; impairment of sensation on right side; right facial muscles weak; right hand grip slightly weaker than left yet insured is right-handed; Romberg is positive; that insured loses his base going backward and at times somewhat to the right; that there is some overlapping in the coordination test of finger to nose and finger to finger equally; and definite speech defect on test phrases (R. 86).

Dr. E. M. Wilder stated that a certain amount of incoordination, like the inability to touch your nose or the end of your fingers, is evidence of lack of complete control of muscular sense and is capable of various interpretations and could be caused by a disturbance of the central nervous system (R. 87).

At that time the insured had a very poor memory for events either recent or remote, and did not seem to care whether his answers were correct or not, and became irritable quite often. He was unable to repeat four figures. While denying the existence of enemies, he admitted he thought people watched him and for that reason seldom went out unless accompanied by his wife (R. 89). The insured denied that he ever thought his food was poisoned or that he felt electric currents pass through his body. Insured cannot control minds of others nor can his mind be controlled. Insured has paranoid trend toward mother-

in-law saying that she tries to run his business and is responsible for his being in hospital.

He was arrested on way to Regional Office (R. 88) and fined $5.00. At first he denied hallucinations then later intimated he heard voices but admitted they might be children on the street.

The report further stated insured was emotionally slow, dull, indifferent and decidedly unstable. It is difficult for insured to focus attention on anything (R. 89).

The insured's mental activity was very much lessened and Dr. E. M. Wilder stated that this indicated the insured to be suffering from some form of dementia (R. 89) and that this is part of his picture of dementia praecox.

The report further stated: "Has no ideas for the future and appears absolutely indifferent to himself and the world in general" (R. 89) and stated "Diagnoses: Psychosis with other diseases or conditions, (organic disease of the central nervous system—type undetermined)." Dr. Wilder explained that "Psychosis" meant insanity (R. 92).

The report stated that "Case was presented to staff conference on November 16, 1931 and the staff agreed to the diagnoses given above. Patient is considered psychotic and incompetent" (R. 92). This, Dr. Wilder explained was the same as saying the man was incompetent and insane. The report further stated that the insured should not resume his former occupation (R. 92).

An examination of the insured conducted by Dr. Bert S. Thomas, designated medical examiner for the Veterans Administration, at Sacramento, California, July 30, 1934, (R. 93) indicated that the brain, spinal cord, peripheral nerves and mentality of the insured were not normal; that while in a quiet stage the insured had normal intelligence; that insured had a poor memory both for remote and recent events; he was thoroughly oriented but has history of wandering off and not knowing where he is for days; that he goes from excitable resentful stages into sorrowful tears; that when in the excitable stage his attention cannot be held; that insured sometimes becomes rather vicious, fighty, is likely to break up furniture; that insured looked to all intents a killer type; that insured had definite delusions of

oppression at times; and "Patient is incompetent" (R. 93).

The above report included a diagnosis of "Psychosis-manic and depressive insanity incompetent" (R. 93); and that insured should have an attendant for travel (R. 94); that "Claimant mentally incompetent. Guardian necessary."

Dr. Wilder said in comment upon Dr. Thomas' statement that the insured looked like a killer, "any man that has delusions of persecution is potentially dangerous" and that he agreed with Dr. Thomas that insured should be hospitalized.

Dr. E. M. Wilder stated (R. 95) that one exhibiting insured's characteristics could not work at an ordinary job or hold it as he would feel none of the responsibilities imposed by the position as a normal man would; that he would not do anything he did not want to do; that when a man breaks down mentally "the first thing you know he is out of a job, • • • and then he begins to believe that everybody has got something in for him."

John Tanikawa, who had served with the insured in France, and met him again at the D. A. V. Post in Sacramento in 1936, stated that he had talked to the insured and that he appeared "like he wasn't all there" and that he should say the insured was insane (R. 48); and that the insured then appeared about the same as he had in France when he had to be bound and gagged and that his mentality seemed about the same (R. 48).

Dr. E. M. Wilder testified that he had examined the insured a few evenings previously and that he believed the insured to be suffering from a "schizophrenic branch or form of præcox" or "dementia præcox" and that insured was insane (R. 62).

Dr. Wilder further stated that the insured could not appear as a witness (R. 62) and "the type of disability that • • • makes him perfectly disregardful of what he does, so he doesn't understand the impact of the outside world on his interest or any interest of any kind, he is likely to tell you anything."

Dr. Wilder said (R. 63) that Mr. O'Neill's testimony that the insured was "neat as a pin" before he went in the Army

and his slovenliness when he came home was a manifestation of the fact that he was no longer interested in the outside world and its effect on himself; and that when the insured would say that certain persons wanted to beat him up when in reality they were old friends of the insured, was another example of a tendency to delusions of persecution (R. 64); and that when Dr. Wilder had asked the insured why he did not work and support himself he received the reply "All these fellows are down on me and won't give me a job."

Dr. Wilder stated that while it was part of routine examination in a mental case to determine if patient had ideas of persecution, one wouldn't waste time on it if the man had maniacal fits of manic depression (R. 64).

Dr. Wilder stated that Mr. O'Neill's observations of the change in personality of the insured in that upon return home from the Service he devoted all his thoughts to himself, and was indifferent to everything, was a condition frequently found in a case of dementia præcox (R. 65); and that he himself had observed the witness' behavior as he sat in the courtroom, paying no attention to a matter of utmost importance to him, gazing at his feet, twiddling his thumbs, and not concerned with anything. These were all part of the picture of a lack of reason which disqualified him for any common employment.

Dr. Wilder stated he had asked the insured why he kept losing jobs and was told "Why, they give me orders and I won't take orders from anybody, and I just quit." and that dementia præcox cases are incapable of continuous employment (R. 65).

Referring to the deposition of John O'Neill and the testimony of John Tanikawa, Dr. Wilder stated that the præcox cases usually had an inborn fragility, like a badly-built house which appeared good until a big wind hit it when it would crack open, and that it would be reasonable to assume that had the insured not been subjected to great strain he might have gone through life without cracking up (R. 66). And that it is hard to tell exactly when the breakdown occurred, whether the crude conditions of military life, the crossing on the "Aquatania" or what it was; but that be-

ginning with little spells of anger, etc., the insured went downhill and is still going downhill. Also that a normal man does not go insane under conditions of adversity. And that the incident on the firing line described by Mr. Tanikawa when the insured yelled "The Germans are coming", when no one could find any Germans, is an extreme example of emotional instability. "He blew up under a strain that did not blow anybody else up on the same squad, and on the same duty" (R. 67).

Dr. Wilder testified (R. 67) that the testimony of Chaplain Mathews was a further example of the insured's delusions of persecution—the insured's complaint about the type of discharge he had received; that Chaplain Mathews' observation that the insured had no interest except in himself was a sign of mind failure because of the limited field of interest; and that delusions of persecution makes some dementia præcox cases extremely dangerous in homicidal forms because they are defending themselves against the delusions that someone is going to hurt them.

Dr. Wilder said that the testimony of Lt. Colonel Matthews concerning the conduct of insured while under his command showed part of the picture of a person suffering from dementia præcox, and that such persons are not at all dependable (R. 69).

Dr. Wilder stated (R. 109) that it cannot now be said that a dementia præcox case is curable, even though certain cases have responded to experimental shock treatments, etc., and that the probability is that the insured will be insane for the rest of his life; and his condition at time of trial was permanent and reasonably certain to last throughout his lifetime.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 553

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vs.

THE UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF.

WARREN E. MILLER,
ALVIN GERLACH,
Counsel for Petitioner.

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Respondent, in its brief (B. 4), states the Circuit Court of Appeals held the insured *served an enlistment* in the United States Navy, and *another* in the United States Army, preventing any reasonable inference that he became totally and permanently disabled as alleged. The Court below states that his period of *service* in the Navy and in the Army are such physical facts as to refute any reasonable inference that may be drawn from the evidence that he was totally and permanently disabled as alleged. However, the insured did not "serve an enlistment" in the United States Navy, as those words would imply, because he enlisted for two years (R. 122), and after unsatisfactory service, as testified by Commander Platt (R. 59), he was given a bad conduct discharge (R. 122) in accordance with the sentence

of summary court martial which he received by reason of his conduct during the six months of the enlistment period that he spent in the Navy. It is significant that he served less than one-fourth of his two-year enlistment, and the proper inference to be drawn from this fact is that his abnormal conduct during this six-month period, which prevented him serving this enlistment period, was due to his mental condition.

About three months after entering the Naval Service (January 15, 1920), he left his station and duty without leave, and then, less than three weeks later (R. 124), he again absented himself from his station. As a result of this later infraction of the rules, he was sentenced to the loss of three months' pay and to a bad conduct discharge, but this bad conduct discharge was remitted subject to six months' probation. Notwithstanding such remitting of sentence he was actually given a bad conduct discharge on July 8, 1920 (R. 122). The inference is that his conduct and behavior while on probation were such that the probation was revoked.

Therefore, giving this evidence the reasonable inferences to which it is entitled under the rule laid down in *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721, the short period that the insured spent in the Navy is not such a "physical fact" as to refute reasonable inferences that he was during this period "unable to follow continuously any substantially gainful occupation." The reasonable inference is that the Navy Department would not have discharged him with a bad conduct discharge if he had demonstrated that he could carry on as an enlisted man in the Navy. Considering the other testimony in the case, a reasonable inference to be drawn from the fact that he was not considered by the Navy as a proper person to serve is that the reason for his conduct and incompetence was due to his mental condition, previously established.

The respondent introduced evidence from Lieutenant Klemann, the naval physician who examined the insured at the time he was discharged from the Navy, but who only made a physical examination (R. 115), and not a mental examination. Although this physician stated he found no disabilities, he was asked the following questions, and replied as indicated (R. 115):

"Q. When you say disability, doctor, just what do you mean?

"A. His *physical* condition.

"Q. Do you recall from refreshing your recollection as to just what examination you made of him?

"A. Well you have to make a complete *physical* examination of all men discharged.

"Q. And that was your procedure in connection with your duties as to this sailor?

"A. Yes it was.

"Q. And you found after such examination that Joseph Galloway was not suffering from any *physical* disability?

"A. That is right."

This witness further testified (R. 118, 119):

"Q. And at that time, the examination that you made of him was for the purpose of determining whether or not he had any *physical* disability, is that not true, doctor?

"A. That is right.

"Q. You did not make any tests at that time to determine whether there was any mental impairment?

"A. *I did not, because that is not done.*

"Q. As a matter of fact you have no personal recollection of making the examination at all?

"A. I have not.

• • • • • • •

"Q. Doctor is it not possible that he may have exhibited by his conduct at other times, a condition which

would suggest a mental ailment, and not exhibit it at the time that you were examining him?

"A. *That could be possible.*" (Italics supplied.)

The testimony of this witness of the respondent certainly is not conclusive that the insured was not suffering from a mental disability at the time this witness examined him on July 8, 1920, and does not substantiate the position taken by the Court below.

The insured enlisted in the Army December 7, 1920 (R. 124). Captain E. F. Harrison, who examined him (R. 125-126), recorded the results of his "physical examination at place of enlistment," which record of physical examination clearly discloses that no record was made of any *mental* examination of the insured. Based upon a physical examination only, the witness expressed the opinion that the insured was mentally and physically qualified for service. Respondent's failure to call Captain Harrison (R. 125), who based his opinion of the insured's mentality upon a *physical* examination, or to satisfactorily explain at time of trial why he was not called as a witness, involves a well recognized presumption of law that his testimony, if produced, would be unfavorable to the respondent. This is a proper inference under the circumstances. A short time after Galloway's entry into the Service, the exact date not appearing, but prior to January 27, 1921 (R. 126), he was sentenced to be confined at hard labor for a month and forfeit two-thirds of a month's pay because of his conduct. Some time prior to August 6, 1921, the exact date not appearing, he deserted, and on August 6, 1921, he was dropped from the rolls as a deserter. He was away from the Army from some days before August 6, 1921, it may well be inferred, for he doubtless would not be dropped from the rolls the very first day he was absent, until November 1, 1921, when he

surrendered and was returned to military control. For some reason not apparent of record he was restored to duty a week later without trial. It may properly be inferred that unless some compelling reason existed he would have been court martialed for this desertion, but the record is silent as to the reason he was restored to duty without trial. The jury might well infer he was not court martialed because of his mental disability which was shown by the testimony to have existed prior thereto.

Six months later he again deserted (R. 127). Thus it can be seen that the insured only rendered service from December 7, 1920, to some time prior to January 27, 1921, was then confined at hard labor until the end of February, 1921; then after slightly over five months' service, was dropped for desertion, and then served from November 8th to May 6th, a period of less than six months. He did not actually "serve" except a fractional part of his enlistment period, during which time he was twice sentenced by a court martial for misconduct, and, in addition, deserted the service on two occasions.

The only semblance of a work record of the insured from May 21, 1919, to the date of trial, September 10, 1941 (R. 11), a period of over 22¼ years, appears in these few months of service in the Army and Navy. The result of this service as shown by the record supports and sustains the fact that the insured was unable to "follow continuously any substantially gainful occupation." The following remarks of the United States Court of Appeals for the District of Columbia in *United States* v. *Witbeck*, 113 F. (2d) 185, at page 187, are deemed pertinent here:

> "When commitment is not at issue, laymen may testify to sanity or insanity, since "the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are

more or less understood and recognized by every one of ordinary intelligence * * *.[1] Even if he was sane, Witbeck may well have been totally and permanently disabled by the impairment of his mind. We have held that ability to work spasmodically from time to time,[2] or even to work for considerable periods,[3] does not conclusively disprove total and permanent disability within the meaning of a war risk policy."

Respondent, in its brief (B. 38), comments upon the fact that in April, 1919, the insured stated when he was discharged that he had no reason to believe he was suffering from any impairment. As was stated by the United States Court of Appeals for the District of Columbia, in the case of *Cornwell* v. *Cornwell, et al.*, 118 F. (2d) 396, at 398: "One who is in such a mental condition may be entirely unaware of his incapacity."[3a]

The respondent here urges that undue weight be given to the absence of a notation in the veteran's service records of a mental disorder. That is one phase of the evidence but petitioner urges the entire picture should be considered in determining whether substantial evidence has been submitted rather than picking out certain parts of the evidence and unduly stressing any portion of it. Here we have a man who before entering the service (R. 20) was a picture of health and there was nothing wrong with him mentally (R. 20). When he returned from the service (R. 17) he "was

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"[1] Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 619, 4 S. Ct. 533, 28 L. Ed. 536.

"[2] Burgoyne v. United States, 61 App. D. C. 97, 57 F. 2d 764.

"[3] United States v. Stewart, 61 App. D. C. 115, 116, 58 F. 2d 520.

[3a] "George W. Henry, Essentials of Psychiatry (1931) 204: 'Among the greatest obstacles to preventive treatment are the misconceptions on the part of the general public in regard to mental disorders. Most people regard themselves as mentally "normal." They resent or become alarmed at any suggestion that they have characteristics in common with the mentally abnormal.'"

a wreck compared to what he was when he went away'' and his mind appeared to be unbalanced. He would have crying spells, go off and wander with a lot of nonsensical talk and imagine his good friends were talking about him and wanted to injure him. A marked change in his behavior was then shown. This change in behavior is evidence tending to show unsound mind. In *Knapp* v. *St. Louis Union Trust Co., et al.*, 199 Mo. 640, 98 S. W. 70, it is said:

> "A marked change in a person's habits and thoughts is evidence of mental unsoundness. Insanity is indicated by proof of acts, declarations and conduct inconsistent with the character and previous habits of the person. As said by Schouler on Wills (3rd Ed.) p. 103: 'Insanity, to define that word, settles, as we have already indicated, in the opinion of the best medical men, into a comparison of the individual with himself and not with others; that is to say, some marked departure from his natural and normal state of feeling and thought, his habits and tastes, which is either inexplicable or best explained by reference to some shock, moral or physical, or to a process of slow decay, which shows that his mind is becoming diseased and disordered.' ''

In *American National Bank and Trust Company of Chicago* v. *United States*, 104 F. (2d) 783, in considering the question of total and permanent disability, that court stated at page 785:

> "In the consideration of such a question, it is the duty of the court to take that view of the evidence, and all the inferences that may properly be drawn therefrom, most favorable to the plaintiff, and, if the evidence is of such a character that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury. So, too, the admonition of Mr. Justice Holmes, in *White* v. *United States*, 270 U. S. 175, 180, 46 S. Ct. 274, 275, 70 L. Ed. 530, that the rela-

> tion established between the soldier and the government is a 'relation of benevolence established by the government at considerable cost to itself for the soldier's good' ought not to be forgotten, and, of course, it is to be understood that the term 'substantial evidence' is not to be used in the sense of reliability, but rather in contradistinction to the term 'scintilla of evidence.' *United States* v. *Tyrakowski* (7 Cir.), 50 F. (2d) 766, 770. It is with these principles in mind that the question must be determined."

The insured's condition before the lapse of the policy and in subsequent years have significance only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy. (*Carter* v. *United States* (C. C. A. 4) 49 F. (2d) 221.)

Respondent, in its brief, takes the position (B. 7) that even if the insured did become totally disabled by reason of insanity while his policy was in force, the lack of evidence from 1922 to 1930 constitutes a fatal deficiency in petitioner's proof. The court below likewise said (R. 141) the lack of evidence over a period of years between the insured's "last discharge"[4] from the Army and the appointment of a guardian constituted a "failure in appellant's case."

The insured, it will be observed, was never apprehended after his desertion from the Army in 1922. It is only reasonable that a person with the status of a deserter at large from the United States Army, whose mind was in the condition of that of this insured, would absent himself from those with whom he would usually associate because of fear

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[4] The court below is wrong in this, as the insured was not discharged from his second Army enlistment, and so far as the records show, he is still carried as a deserter. He was dropped from the rolls as a deserter (R. 127) but there appears in the record nothing to show he was ever discharged.

of apprehension and punishment. His mental condition, admitted by both the court and the respondent, at the time of trial to have existed to such a degree that he was then permanently and totally disabled, clearly shows that he could not have testified at the trial of the case. A lack of testimony from 1922 to 1930 is thus explained, and the jury could well infer that only the then admittedly insane insured was in a position to know where he was and what he was doing during these years; as he had lost his mental faculties, the reason for a lack of proof during these years is apparent. The record shows (R. 88) that when he was examined in 1931 he stated he did not remember being in the service and deserting in 1922.

There is ample evidence here to show that the insured was insane prior to 1922 (R. 98, 17, 27, 29, 96, 97, 50, 52, 56). Insanity, being proved, is presumed to continue. (*Wray* v. *Wray*, 33 Ala. 187; *Duffield* v. *Robeson*, 2 Har. (Del.) 375; *Cook* v. *Cook*, 53 Barb. (N. Y. 180.)

Mental unsoundness, once established, is presumed to continue. (*Waters* v. *Waters*, 207 N. W. 598, 201 Ia. 160; *Fendler* v. *Roy*, 58 S. W. 459, 331 Mo. 1083; *In re Kelher* (C. C. A. 2), 159 Fed. 55.)

These decisions are in accordance with the recognized principle of law that once the existence of a condition has been shown it will be presumed, in the absence of a showing to the contrary, to continue. Here, in addition to the presumption of law applicable to the eight years for which there is no direct testimony, during which it is presumed that the insured's mental condition continued as previously shown by his behavior, we have a definite condition of total and permanent disability by reason of insanity, recognized by the court below to have existed since February 11, 1932 (R. 141) and recognized by respondent to have existed at the time of trial (B. 7).

Considering all the circumstances here, the insured's station in life, a laborer (R. 125), his desertion from the Army, the fact that he is apparently still carried as a deserter on the Army Rolls, and a reward having been available to anyone who might inform Army authorities of his whereabouts in order that he might be apprehended as such deserter, his mental condition as shown before and immediately after this period—considering these facts together with all the other facts in the case, it is respectfully submitted that in this case the inability of petitioner to supply direct evidence does not constitute a fatal deficiency in petitioner's proof.

> "The phrase 'total permanent disability' is to be construed reasonably and having regard to the circumstances of each case. * * * The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules or formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others." (*Lumbra* v. *United States*, 200 U. S. 550, 78 L. Ed. 492.)

The cases cited by respondent in its brief in support of its position, and by the court below, differ factually from the instant case, and are readily distinguished from the situation existing here. In the case of *United States* v. *LeDuc*, 48 F. (2d) 789, cited by counsel and also mentioned by the court below, the insured, who was suffering from a physical disability, tuberculosis, passed different physical examinations.

Respondent, in its brief, challenges the sufficiency of the expert opinion testimony given by Dr. E. M. Wilder, which testimony is based upon facts admitted in evidence. Petitioner's position is that Dr. Wilder's testimony constituted substantial evidence, and that the court below did not give

to it the consideration to which it was entitled, in holding there was no substantial evidence in this case sufficient to submit the case to the jury.

A qualified physician, assuming the facts as established by other testimony in the case as true, is competent to give an expert opinion as was done here. (*United States* v. *Cannon* (C. C. A. 1), 116 F. (2d) 567; *United States* v. *Aspinwall*, 96 F. (2d) 867; *Asher* v. *United States*, 63 F. (2d) 20; *United States* v. *Fulkerson*, 67 F. (2d) 288.) [5]

Respondent states there is no evidence of the permanency of the insured's condition, which existed prior to May 25, 1919 (B. 40). However, it is respectfully submitted that when considering the evidence as a whole, the testimony of the witnesses who personally observed the insured, and the medical testimony, there is ample evidence apparent in this record from which the jury could properly find that the insured's condition, as it existed prior to May 25, 1919, was permanent. John Tanikawa, who observed the insured while his policy was in force, and in 1936, testified (R. 48) that in 1936 "he was not all there," and appeared the same as he did when the witness observed him in France. The continuation of this disability over this long period of time, now admitted by both the court below and respondent in its brief to be permanent, is evidence of its permanency. (*McGovern* v. *U. S.*, 294 Fed. 108, aff. 299 Fed. 302, cert. den. 267 U. S. 608.)

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[5] See also: *United States* v. *Messinger* (C. C. A. 4) 68 F. (2d) 234; *United States* v. *Jensen* (C. C. A. 9) 66 F. (2d) 19; *United States* v. *Sorrow* (C. C. A. 5) 67 F. (2d) 372; *United States* v. *Polley* (C. C. A. 7) 67 F. (2d) 598; *United States* v. *Ellis* (C. C. A. 5) 67 F. (2d) 765; *United States* v. *Lynch* (C. C. A. 5) 67 F. (2d) 835; *Meyer* v. *United States* (C. C. A. 5) 65 F. (2d) 509; *LeBlanc* v. *United States* (C. C. A. 5) 65 F. (2d) 514; *United States* v. *Dudley* (C. C. A. 9) 64 F. (2d) 743; *United States* v. *Francis* (C. C. A. 9) 64 F. (2d) 865; *United States* v. *Thomas* (C. C. A. 10) 64 F. (2d) 245.

Contrary to respondent's contention, it is believed that the facts here are stronger for the petitioner than those which existed in the case of *Halliday* v. *United States* (315 U. S. 94, 62 S. Ct. 438, 86 L. Ed. 393). Here, as in the *Halliday* case, the insured was normal and healthy before he entered the service, but upon being discharged a marked change in his habits, demeanor and conduct was observed (R. 17, 18, 19, 21, 27, 30, 39, 42, 96, and 97). In the *Halliday* case, this Court stated there was evidence of mental disability for fifteen years. Here, such evidence appears from 1918 to 1941, a period of over twenty-two years.

A witness testified in the *Halliday* case, and in the instant case (R. 48), that the insured's condition was the same after the policy lapsed as before.

In the *Halliday* case, numerous medical examinations, considerably more than are here present, were made by government doctors, the reports of which tended to controvert Halliday's claim of total and permanent disability.

In the *Halliday* case, this Court, in commenting upon the unfavorable inferences the jury was entitled to draw from the failure of Halliday to take medical treatment, said:

> "There can be no doubt that evidence of the failure of attempted treatment would have been highly persuasive of the permanence of petitioner's disability. And the jury was entitled to draw inferences unfavorable to his claim from the absence of such evidence. However, this was but one of the many factors which the jury was free to consider in reaching its verdict. In the fact of evidence of a mental disorder of more than 15 years duration, it can hardly be said that the absence of this single element of proof was fatal to petitioner's claim. Moreover, inferences from failure to seek hospitalization and treatment must be drawn with the utmost caution in cases of mental disorder, where, as here, there is reason to believe that one of the

manifestations of the very sickness itself is fear and suspicion of hospitals and institutions."

Here, instead of a failure on the part of insured to take hospital treatment, respondent is complaining of the absence of evidence for a period of over eight years. The reason for this is adequately explained by the fact that the insured did not remember being in the service and deserting in 1922 (R. 88) and the further fact that insured did not testify because he was unable to do so due to his mental condition. It is petitioner's position that this was but one of many factors which the jury should have been allowed to consider in reaching its verdict, and the Halliday opinion supports petitioner's position here.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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No. 553

In the Supreme Court of the United States

OCTOBER TERM, 1942

JOSEPH GALLOWAY, BY FREDA GALLOWAY, HIS GUARDIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 135–141) is reported in 130 F. (2d) 467.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 1, 1942 (R. 142). The petition for a writ of certiorari was filed on November 28, 1942, and granted on January 4, 1943

(R. 142). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended February 13, 1925.

QUESTION PRESENTED

Whether the courts below correctly held that petitioner had not adduced substantial evidence to show that the insured was totally permanently disabled on May 31, 1919.

STATUTES AND REGULATIONS INVOLVED

The insurance contract sued on was issued pursuant to the provisions of the War Risk Insurance Act, and insured against death or total permanent disability (c. 105, Sec. 400; 40 Stat. 398, 409).

The same Act, as amended, provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes * * * (c. 77, Sec. 13; 40 Stat. 555).

Pursuant to this authority, there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially

> gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it * * * (Regulations and Procedure, U. S. Veterans' Bureau, Volume 1, p. 9).

STATEMENT

Petitioner seeks to recover total permanent disability benefits under a contract of yearly renewable term insurance which was issued to Joseph Galloway on February 1, 1918, and which lapsed on May 31, 1919, at the expiration of the grace period for payment of the premium due on May 1, 1919 (R. 14–15).

The case was tried to a jury with issue joined on the alleged occurrence of total permanent disability while the policy was in force. After the introduction of all the evidence, the District Court granted the Government's motion for a directed verdict upon the ground that there was no substantial evidence to show that the insured was totally permanently disabled before the policy lapsed (R. 127–128). The jury was instructed to return a verdict for the Government, and judgment was entered upon this verdict (R. 13–14).

Upon appeal, the judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 135–141).

The Circuit Court of Appeals held that the facts, established by undisputed evidence, that subsequent to the date of alleged total permanent disability the insured served an enlistment in the United States Navy and another in the United States Army, prevented any reasonable inference that he became totally permanently disabled as alleged. In this respect, the court referred in its opinion to evidence showing that the insured passed several medical examinations incident to these periods of service; that the records of his service disclosed no recognition of mental disorder; and that officers under whom he served regarded him as sane and able to perform regular military duty which he did, in fact, perform.

The court also expressed the view, in its opinion, that the evidence favorable to petitioner, considered by itself, provided a basis for nothing more than speculation and conjecture that the insured might have been totally permanently disabled prior to May 31, 1919. In addition, it characterized the lack of evidence covering a period of many years following 1922 as a "failure in appellant's [petitioner's] case."

SUMMARY OF ARGUMENT

The law requiring the direction of a verdict in the absence of substantial evidence is long established and is as applicable to litigation upon a contract of war-risk insurance as to any other litigation. And where, as here, the trial court has

directed a verdict and the Circuit Court of Appeals has ruled that the direction of the verdict was proper, this Court "will rightfully be much influenced by their concurrent opinions." *Patton* v. *Texas and Pacific Railway Co.*, 179 U. S. 658, 660.

Petitioner alleges maturity by total permanent disability of a contract which expired May 31, 1919. The alleged cause of the claimed maturity is a mental disorder first found upon medical examination in 1930, and thereafter diagnosed as dementia praecox.

The testimony of petitioner's expert medical witness, insofar as it has any substantial tendency to support the claim, is without adequate factual foundation. And the evidence as a whole, if it may be reconciled with the hypothesis relied upon by petitioner, is equally if not more consistent with an hypothesis that the insured suffered periodically, from 1918 to 1922, from the effects of his demonstrated addiction to intoxicants, and inferable addiction to narcotics; hence the evidence has no substantial tendency to establish petitioner's hypothesis. *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343.

Thus the very existence of dementia praecox during the life of the contract is speculative. But even if it is assumed that the isolated instances of abnormal behavior shown by the record were recurring manifestations of dementia prae-

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cox, the evidence relied upon to establish total disability at that time [as the result of the assumed existence of this disease] is sketchy at best, and any inference of total disability sought to be drawn therefrom would be directly contrary to undisputed facts showing that, during substantial periods, no total disability existed from any cause.

Finally, it is a fatal deficiency with respect to petitioner's further burden of showing the permanence of total disability during the life of the contract that petitioner should have omitted any proof with respect to the condition and activities of the insured over so extended a period as eight years. Especially is this true where, as here, the disease relied upon as having created a permanent total disability is one frequently recognized in decided cases as subject to periods of remission and as being, during such periods, consistent with the pursuit of many substantially gainful occupations.

Berry v. *United States,* 312 U. S. 450, and *Halliday* v. *United States,* 315 U. S. 94, relied upon by petitioner, are of no assistance to her. The facts in the former differ so markedly from those in the instant case as to deprive that case of any relevance other than as an example of the multitude of cases applying the established substantial evidence rule. The *Halliday* case, however, is pertinent and appears upon analysis to support the correctness of the decisions below.

ARGUMENT

THE COURTS BELOW PROPERLY HELD THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO SHOW THAT THE INSURED WAS TOTALLY PERMANENTLY DISABLED ON MAY 31, 1919.

Petitioner asserts that she presented substantial evidence to show that the insured was totally permanently disabled on May 31, 1919, by reason of insanity. She relies upon laymen's descriptions of the insured's conduct and appearance upon occasions in 1918 and the immediately ensuing years; medical diagnoses of the insured's condition in 1930 and thereafter; and the opinion testimony of one medical witness, who first saw the insured in August 1941, as to the condition reflected by the lay testimony pertaining to the period prior to 1922.

The Government concedes that the evidence would support a finding that the insured was totally permanently disabled at the time of the trial 1941, and the court below assumed total permanent disability from February 1932, when petitioner was appointed guardian. Insured was found, upon medical examinations in 1930 and thereafter, to have a mental disability. The condition, as described by Dr. Wilder, who examined the insured in 1941, may reasonably be regarded as totally disabling at that time, and Dr. Wilder testified to an opinion that it was then permanent.

However, the period of more than ten years

between the lapse of the insurance in early 1919 and the diagnoses of mental disorder in 1930 is not spanned, we believe, by substantial evidence of total permanent disability. The expert opinion testimony—designed by petitioner to bridge that period—is devoid of probative value for that purpose because of the inadequacy of the factual foundation upon which it rests. Moreover, there are undisputed facts wholly inconsistent with an inference that the insured was totally disabled while his insurance was in force and thereafter for the period 1919 to 1922. Even if it were to be assumed that the insured became totally disabled by reason of insanity while his policy was in force, the lack of any evidence to show continuance of total disability from 1922 to 1930 would nevertheless constitute a fatal deficiency in petitioner's proof.

I. SUMMARY OF THE EVIDENCE

The insured, who had worked as a longshoreman, "catch as catch can," in Philadelphia and elsewhere (R. 27–28), enlisted in the Army on November 1, 1917 (R. 120). A fellow soldier, closely associated with him, testified that in December 1917 the insured was "just a regular soldier," apparently normal and neat in appearance, and neither nervous nor quarrelsome (R. 42–43), and that this condition continued until they arrived in France about the middle of April 1918, when the insured

began to be quarrelsome and nervous (R. 42, 46).

The only other evidence antedating April 1918 is the notation in the insured's service records: "Summary court martial approved February 2, 1918, Articles of War 61" (R. 121). The 61st Article of War has to do with absence without official leave[1] (R. 55).

The witness Wells testified that, during the night of April 16, 1918, the insured disturbed the camp at Aizonville, France, by "hollering, screeching, swearing" (R. 32), with cause not known to the witness (R. 36); that "the men poured out from the whole section" (R. 32); "the officers went up to quiet him"; "I saw the result, a black eye for Lt. Warner"; but "You didn't see who gave it to him? No" (R. 40–41). The witness testified that the insured was then transferred to battalion headquarters, and that he last saw him in July 1918, serving food from a field kitchen (R. 37–38).

Another witness, Tanikawa, who had renewed his acquaintance with the insured in 1936 (R. 47), testified that, in June 1918, while on guard duty at night on the bank of the Marne River, the

[1] That Article (10 U. S. C. 1533) provides:

"Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct."

insured screamed "The Germans are coming!" when there was nothing to indicate to the witness, who was nearby, any activity on the part of the Germans, who were on the opposite bank of the river (R. 44–45; cf. R. 36). This witness testified that the insured appeared to be out of his mind and insane at the time; that his fellow soldiers bound and gagged him to prevent disclosure of their presence to the enemy; and that Galloway was court-martialed as a result of the incident (R. 45–46).[2] The same witness testified that Galloway was on active duty in the Argonne drive on and after October 1, 1918 (R. 46, 49), and was "acting queer" (R. 46).[3]

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[2] The witness is evidently mistaken in thinking that Galloway was court-martialed as a result of anything which may have occurred in June 1918. The official records disclose no court-martial proceedings affecting Galloway during this enlistment, except for absence without leave in February 1918 (R. 121). The testimony of the witness Wells indicates that Galloway's offense in June was in starting a rumor that the Germans were coming, although Wells admits the lack of any personal knowledge of the incident (R. 36).

[3] The witness is evidently mistaken in thinking that the insured participated in the Argonne battle. The indication given at R. 46 that the American advance began September 26, 1918, corresponds with historical fact of which the Court may take judicial notice. But the official records show that Galloway was hospitalized for influenza from September 24, 1918, to January 3, 1919, at which time he was returned to active duty as "Class A" (R. 121). Moreover, it appears from Tanikawa's testimony that he had no recollection of the date when Galloway left his

The only additional evidence relating to the enlistment of the insured expiring on April 29, 1919, is the record in connection with his honorable discharge on that date. On the preceding day, he had been examined by a medical officer of the United States Army, who certified that he gave the insured a careful examination and found him physically and mentally sound. The insured's commanding officer likewise certified on April 28, 1919, that he did not know, nor had he any reason to believe, that the insured suffered from any injury or disease. The insured himself certified that he had no reason to believe that he suffered from the effects of any disease or injury, or that he had any disability or impairment of health (R. 121–122).

John O'Neill, who had known the insured since childhood (R. 16), and prior to service had worked with him intermittently in employment as a longshoreman (R. 27–28), testified that he also had known him after service in April 1919, and for a time thereafter. He saw him every day in 1919 (R. 18), but was not sure whether the insured worked during that year (R. 20), although he indicated the recollection that the insured did not work at the same place as the witness (R 23).

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battalion, and that he himself was wounded and left the organization, returning to this country "August 18" (R. 47).

The witness observed a marked change in the insured, who was "a wreck compared to what he was when he went away," talked nonsense, indulged in crying spells,[4] imagined that friends were enemies, got the idea that he was a friend of Grover Bergdoll and wanted to get in touch with him about a pot of gold that Bergdoll had hid (R. 17–18, 19). The witness considered that the insured's mind was "evidently unbalanced" (R. 17), although he would be all right "maybe a couple of days, maybe a couple of months" (R. 20). He testified that there were days when "evidently his mind would drift and he didn't care about his appearance and he would splabber around the mouth here and he didn't bother shaving or nothing" (R. 19–20). The witness was surprised that the insured was able to get into the Army and Navy (R. 20, 25).[5]

Extremely uncertain is the duration and extent of O'Neill's post-war contact with the insured. First fixing it as 5 or 6 or 7 years after 1919 (R. 16–17), during which "we were chums together all the time" (R. 17), it was then given as the witness' opinion that his contact extended over

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[4] He found the insured crying. "I said, 'What is the matter Joe?', and he said 'God damn it, I must be a Dr. Jekyll and Mr. Hyde'" (R. 19).

[5] The insured enlisted in the United States Navy on January 15, 1920, and served until July 8, 1920, and thereafter he reenlisted in the United States Army on December 7, 1920, and served until May 6, 1922 (R. 122, 124, 127).

a period of 5 years (R. 20).* He testified, however, that while he had heard that the insured had reenlisted, he did not have personal knowledge of either reenlistment. The witness later testified, "I can remember this now: That after he was away for five or six years, he came back to Philadelphia, but I wouldn't know nothing about dates on that * * * that would be around 1926 or so" (R. 29–30). The witness also testified, "I don't know just when or how often I seen him except when he first come home for the first couple of months" (R. 24).

It is clear that O'Neill, who remained in Philadelphia, had little, if any, opportunity to observe the insured between January 1920 and May 1922. The insured was absent serving in the United States Navy from January 15 to July 8, 1920, and in the United States Army from December 7, 1920, to May 6, 1922 (R. 122, 124, 127). He was in Detroit when he enlisted in the Army for the second time (R. 124. Whether he returned to Philadelphia and was observed by the witness during the time between these two periods of

* This testimony is in irreconcilable conflict with the witness' later testimony (R. 29–30) that the insured returned to Philadelphia in 1926 or so after an absence of 5 or 6 years. The direct conflict between these two items of testimony with respect to the dates of the witness' post-war observations, deprives both of evidentiary value; choice between them would be an unsupported guess. Cf. *United States* v. *Kiles*, 70 F. (2d) 880, 882–883 (C. C. A. 8).

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service (July to December 1920) does not clearly appear. Some time about 1920 or 1921, O'Neill testified, the insured was recalled to Philadelphia to testify for the prosecution in a criminal trial (R. 26).[1]

Commander Platt, an officer aboard ship with the insured during the period of his service in the Navy, testified that, by reason of leaving the ship without permission and not being amenable to discipline, the insured caused considerable trouble and that, after repeated warnings, he was sentenced by summary court martial for a bad-conduct discharge (R. 56–57). Records of the Navy Department show that he was absent without official leave for 11 hours on May 26, 1920, and likewise absent for 3½ hours and drunk on May 19, 1920. Punishment imposed by order of summary court martial for these offenses was, on the first occasion, loss of pay in the amount of $31.10 and deprivation of liberty on shore on a foreign sta-

[1] Possibly this visit of the insured is the one to which the witness referred when he suggested that the insured may have returned to Philadelphia about 1926 (R. 30) but "I wouldn't know nothing about dates on that" (R. 29). The several admissions of the witness concerning his lack of recollection of dates, coupled with his demonstrated lack of knowledge of the insured's post-war activities, clearly deprive the testimony of the witness of any probative value whatever with respect to the period between 1922 and 1930 and greatly impair the probative value of his testimony with respect to any period except possibly the first few months after the insured's discharge on April 29, 1919. Cf. *United States* v. *Niles*, 70 F. (2d) 880, 882–883 (C. C. A. 8).

tion for one month and, on the second occasion, loss of pay in the amount of $144 and a bad-conduct discharge, the latter remitted subject to six months probation (R. 124). It is inferable that he violated the probation since, although no explanation for it appears, he was given a bad conduct discharge from the Navy on July 8, 1920 (R. 122).

Dr. George F. Klemann testified that, as a lieutenant in the Medical Corps of the United States Naval Reserve, he examined the insured prior to that discharge; that he found no evidence of mental or physical defects; that it was his practice to record any mental defects noticed; and that he made no such notation (R. 114–117).

On December 7, 1920, the insured again enlisted in the Army (R. 124). Upon medical examination at that time no abnormality was noted and he was passed by the examining physician as mentally and physically qualified for Army service (R. 125–126). Army records reflect that, in January 1921, he appeared on the street drunk and disorderly and was sentenced by summary court martial to confinement at hard labor and forfeiture of two-thirds pay for one month (R. 126).

For a number of months following this enlistment, the insured was at Camp Travis, Texas, serving directly under Sergeant Earl Shipp, who testified that the insured drank but not while on duty; that his general conduct appeared to be

that of a normal person, there being nothing to indicate that he might be insane; that he took orders and performed duties as a regular soldier (R. 110–111); that he was dependable; that he was not "out of tune" with things; and that he was not contentious (R. 112–113).

Lieutenant Colonel James E. Matthews, then the company commander under whom the insured served during the period mentioned in the preceding paragraph, testified that he once intended to make the insured a corporal because of his familiarity with military accomplishments and his ability to handle men, but later found it necessary to discipline him and concluded that he could not be depended upon (R. 73). This witness identified his signature on the Army record of punishment for drunkenness and disorderly conduct in January 1921, referred to above (R. 74), and further testified that the insured apparently drank considerably, was "what we called a bolshevik," did not seem to be loyal, and acted as if he were not getting a square deal. "I thought at that time he was a moral pervert and probably used narcotics. He was one of three men in my entire experience that I could not appeal to. I decided that he was not a desirable soldier, but I could not get enough on him to have him tried and awarded a dishonorable discharge" (R. 73).

This witness further testified that, after serving the sentence imposed upon him in January 1921,

the insured returned to duty in his organization and remained until he was transferred to Camp Benning (R. 74) during the summer of 1921 (R. 73). During these remaining months of service, Colonel Matthews testified, the circumstances were such that he had opportunity to observe the insured frequently; that insured had periods of exhilaration and gaiety, apparently due to liquor or drugs, followed by periods of depression, "as if he had a hangover" (R. 75, 79); that he talked incoherently upon occasions when he was drunk (R. 78–79, 82); that "At times he was one of the very best soldiers I had. * * * At other times I could not depend on him. He would be absent from reveille, for instance" (R. 78; cf. R. 82, 83); that he obeyed orders without apparent resentment, although more cheerfully upon some occasions than upon others; that he got along very well with his fellow soldiers (R. 79); that except for one or more occasions when he appeared to be under the influence of liquor or drugs, he appeared to be able to do his work (R. 80); and that, aside from such occasions, he caused no trouble (R. 82).

Colonel Matthews testified that attempts to obtain proof that the insured was addicted to the use of drugs were unsuccessful (R. 74, 79–80), but that "He acted just like I had noticed other men that I know to be addicts to drugs. * * * The pupils of his eyes appeared to be dilated. He nor-

mally was bright and intelligent, and when you would question him he would not answer the same way" (R. 80). "I am not an expert on insanity. I have been around some insane persons and have had to on one or more occasions be responsible for persons who were violently insane, and from what experience I have had from insanity, he just did not have the actions of these insane persons with whom I am familiar" (R. 81). "As I remember the case and observing him today under the same conditions, after these additional years of experience, I do not believe I would conclude he was suffering from insanity" (R. 75). "I did not consider the man insane in any respect" (R. 81).

The insured was transferred from the command of Colonel Matthews sometime during the summer of 1921 (R. 73), and thereafter, on August 6, 1921, he was absent without official leave and was dropped as a deserter. He surrendered to military authorities in California on November 1, 1921, and on November 28th was restored to duty without trial and transferred to the Coast Artillery Corps (R. 126). On February 15, 1922, the insured, found upon trial by summary court martial to have "behaved in disorderly and disgraceful manner while detailed as a member of a firing squad", was sentenced to lose two-thirds' pay for two months (R. 126).

On May 6, 1922, the insured was absent without official leave, and three days later was dropped as a deserter (R. 127).

Lieutenant Colonel Albert K. Mathews, an Army Chaplain, testified that he saw a soldier named Joseph Galloway at Fort MacArthur, California, during the early part of 1920 (at which time the insured was not in the Army (R. 56–57, 122–124)). His observation extended over a period of six weeks, during which the soldier concerning whom he testified, was a hospital patient under observation for mental disorder and a prisoner under charges of desertion or absence without leave; the patient-prisoner seemed mentally deranged because he was usually abnormally depressed; appeared mentally exhausted, and would "excitedly launch into a discussion of what, to his understanding, was discrimination on the part of the military authorities in failing to give him a disability discharge, it was with difficulty that I could divert his mental processes during these conversations" (R. 50). This witness further testified that the patient-prisoner seemed to show no interest in Army life in general, or in anything other than his own claim; that he identified the patient as an "egocentric," and his condition as "monomania" (R. 51); and that he regarded him as irrational and as of unsound mind (R. 53, 56).

The witness frankly admitted that he could not identify the person to whom his testimony referred (R. 54) and, whereas he described a soldier "patient-prisoner in the Station Hospital at Fort MacArthur" (R. 55) "in the early part of 1920" (R.

55), who was under charges either of absence without official leave or of desertion (R. 50), petitioner's own evidence shows that, in the early part of 1920, the insured was serving in the Navy aboard the *Olympia* (R. 56–57; see also Navy records, R. 122–124).

Official Army records (the Government's evidence) show that the insured was at Fort MacArthur for a time in 1922, but petitioner does not seek to draw from them an inference that the chaplain may have observed the insured in 1922. Presumably petitioner felt precluded from any such transposition of dates because these official records show the insured not to have been either hospitalized or imprisoned, or to have been under charges of unauthorized absence during that period (R. 126–127). While the insured's services at Fort MacArthur terminated by desertion (R. 127) it appears that he was not thereafter returned to that station. Significant also in this connection is the fact that Chaplain Mathews specifically testified that he had furnished an affidavit or deposition to the family at the time the patient observed by him was "released from the service" (R. 53). It is undisputed and officially certified that the insured deserted and in 1940 was still carried on the rolls as a deserter at large (R. 120). On cross-examination, Chaplain Mathews was apprised that the insured was not at Fort MacArthur in 1920 (R. 53), and redirect examination of him was obviously

designed to elicit an admission that he may have been mistaken as to the date of his observation of the soldier described in his testimony. Yet, while conceding that error was possible, he nevertheless, with regret that he could not help counsel, reaffirmed, "the early part of 1920 is the best of my recollection" (R. 55).*

The record is entirely barren of evidence to show physical or mental disability during the eight years between 1922 and 1930. The insured's activities and earnings during those years are likewise not shown, nor is there any disclosure of the existence, at any time, of any source of income on the part of the insured other than earnings. It is definitely established that the insured married petitioner on February 14, 1929 (R. 119), but petitioner did not testify at the trial. Perhaps the insured corresponded with

* The courts below were entitled to disregard entirely the testimony of Chaplain Mathews on the ground that the time and place to which it related, and the circumstances of the person whom it concerned, provided no basis for any reasonable inference that it related to the insured; indeed, the evidence appears to preclude any such inference. The circumstances are such that an inference of identity of person by reason of identity of name obviously cannot be indulged. It is a matter of common knowledge and therefore, we submit, subject to judicial notice, that many persons have identical names. (The frequency of repetition of any particular combination of names like that of "Joseph Galloway" may be ascertained from any large index such as that maintained by the Veterans' Administration with respect to former service men.)

the witness O'Neill during the years from 1922 to 1930 (R. 28).

A series of medical examinations of the insured was made by Veterans' Bureau doctors beginning on January 13, 1930. On that date findings were negative for syphilis (R. 84). On May 19, 1930, his condition was diagnosed as "Moron, low grade", and observation for dementia praecox, simple type, was recommended (R. 85). Further tests for syphilis, made two days later, were negative (R. 85). On November 16, 1931, an examination at a Veterans' Administration hospital resulted in a diagnosis of "Psychosis with other diseases or conditions (organic disease of the central nervous system—type undetermined)" (R. 85–91). Petitioner was appointed guardian of the insured on February 11, 1932 (R. 15). Further examination on July 30, 1934, resulted in the following diagnoses (R. 93).

> Psychosis-manic and depressive insanity incompetent; hypertension, moderate; otitis media, chronic, left; varicose veins left, mild; abscessed teeth roots; myocarditis, mild.

Dr. E. M. Wilder testified, as an expert witness* for petitioner, that in August 1941 and thereafter (R. 62, 100) he examined the insured

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*Dr. Wilder disclaimed any designation as a specialist in mental diseases (R. 100). However, his wide experience as a witness includes frequent qualification as an expert in psychiatry (R. 60, 100–101).

several times for the purpose of preparing the testimony to be given at the trial, and found that he was suffering from dementia praecox, schizophrenic branch. Regarding the insured's condition at the time of trial, and with respect to the question as to whether at that time insured was able to appear as a witness, the doctor testified to an opinion that he was insane; "I don't think that you could depend upon what he told you"; "he doesn't understand the impact of the outside world on his interests or any interest of any kind, he is likely to tell you anything" (R. 62; see also R. 63).

Upon the testimony of O'Neill regarding the insured's condition in 1919, Dr. Wilder testified to an opinion that the insured had then lost interest in the effect of the outside world upon him (R. 63); that he had a tendency to delusions of persecution (R. 64); that he had abandoned all interest in his relations with the outside world; that his personality was so changed that he devoted all his thoughts to himself and was indifferent to everything (R. 65); (and quite evidently making factual assumptions from other sources than O'Neill's testimony) that he was apparently normal until he went to France, when he began to go to pieces (R. 66); that in the spring of 1919 he was still suffering from the acuteness of the break-down, with more emotional disturbance over longer periods than he has now; that he is

still going downhill, but it began with the breakdown; and that "His conduct was something that no man who hasn't lost his regard for the outside world's impact upon him is going to do, to black their officers' eyes, and curse them, and so forth" (R. 66).

Dr. Wilder testified to an opinion that the incident on the Marne River when the insured shouted that the Germans were coming was an example of emotional instability, which is "part of the picture" (R. 67), and to the further opinion that the soldier described by Colonel Albert K. Mathews, the chaplain, had manifested delusions of persecution and loss of interest in the outside world (R. 67–68). This witness further testified to an opinion that the insured's condition in 1921, as described by Colonel James E. Matthews, indicated a loss of interest in anything, military or otherwise (R. 69).

Upon the basis of all of the evidence adduced by petitioner, Dr. Wilder testified to an opinion that the insured was insane in June 1918, in April and May 1919 (R. 96–97), in the spring of 1920[10] (R. 98–99), and the spring of 1921 (R. 98; cf. R. 72). Finally, this witness testified to an opinion that at all times since July 1918, at least, the insured "has been insane to the point

[10] As to this date, the basis of the doctor's opinion was the testimony of Chaplain Albert K. Mathews, in which, as above shown, there is a lack of identification of the subject of observation. See footnote 8, *supra*, p. 21.

that he was unable to adapt himself * * * speaking from an occupational standpoint" (R. 99). He further explained, however, that he thought that persons such as the insured, suffering from dementia praecox, could do routine work pretty well if not "subjected to pressure from the outside" (R. 95, 98).

On cross-examination, Dr. Wilder testified that he regarded the insured's condition in 1930 to be "very well fixed by the Government's Veterans examination", and that information regarding the years from 1925 to 1930 was not essential to the opinions he had testified to, although he conceded that his conclusions would be a great deal different on the assumption that the insured had worked regularly from 1925 to 1930 (R. 101–102).

II. IT WAS THE DUTY OF THE DISTRICT COURT TO DIRECT A VERDICT FOR THE GOVERNMENT IN THE ABSENCE OF SUBSTANTIAL EVIDENCE TO SUPPORT A VERDICT FOR PETITIONER

The body of law prescribing the duties of a trial judge with respect to the direction of a verdict in a jury trial in a federal court is clear and well established. In *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, it is pointed out at p. 384 that both the court and jury are essential factors in such a trial, the former to direct and supervise and the latter to determine issues of fact. In the same opinion, at p. 369, it is stated:

> * * * when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the

> inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.

See also: *Gunning* v. *Cooley*, 281 U. S. 90, 93–94; *Southern Railway Co.* v. *Walters*, 284 U. S. 190, 194; *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Baltimore & C. Line* v. *Redman*, 295 U. S. 654; Rule 50 (b), Federal Rules of Civil Procedure.

In two recent cases, involving the review of administrative determinations, the subject of substantial evidence was considered. *Edison Co.* v. *Labor Board*, 305 U. S. 197, 229; *Labor Board* v. *Columbian Co.*, 306 U. S. 292, 300. Mr. Chief Justice Hughes stated in the former:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. 2d 985, 989; *National Labor Relations Board* v. *Thompson Products*, 97 F. 2d 13, 15; *Ballston-Stillwater Co.* v. *National Labor Relations Board*, 98 F. 2d 758, 760. * * *

And, in the latter, the present Chief Justice said:

> Substantial evidence is more than a scintilla, and must do more than create a suspi-

> cion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co.* v. *National Labor Relations Board, supra*, p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

With respect to the procedural situation in the instant case, in which the trial court directed a verdict for the defendant and the Circuit Court of Appeals affirmed the judgment based upon that directed verdict, the discussion in *Patton* v. *Texas and Pacific Railway Co.*, 179 U. S. 658, 660, is apposite:

> * * * the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court,

> this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

There have been a number of decisions by this Court applying, in cases involving contracts of war-risk insurance, the long-established principles governing the disposition of a motion for a directed verdict. *Lumbra* v. *United States*, 290 U. S. 551; *United States* v. *Spaulding*, 293 U. S. 498; *Miller* v. *United States*, 294 U. S. 435; *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9), affirmed, without opinion, 291 U. S. 646; *Berry* v. *United States*, 312 U. S. 450; and *Halliday* v. *United States*, 315 U. S. 94.

It was held in each of the two cases last named that the trial court properly denied the Government's motion for a directed verdict, whereas in each of the other cases cited it was held that a directed verdict was properly granted or improperly refused. Petitioner, referring only to these two of the foregoing cases, appears to assume, solely because the application of established legal principles in the decision of the *Berry* and *Halliday* cases led to the conclusion that a directed verdict was properly denied, that the principles

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[11] See application of this rule in *Brown* v. *Capital Transit Co.*, 127 F. (2d) 329, 330 (App. D. C.). And compare *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9), affirmed, 291 U. S. 646; *Miller* v. *United States*, 294 U. S. 435.

announced by this Court in the preceding war-risk cases have been abandoned.

There is obviously no justification for this view either upon the ground of departure from the substantial evidence rule generally,[11] or of differentiation in the decision of war-risk insurance cases. See *United States* v. *Still*, 120 F. (2d) 876, 880–881 (C. C. A. 4), certiorari denied, 314 U. S. 671. Cf. *Pence* v. *United States*, 121 F. (2d) 804 (C. C. A. 7). It has been recognized by the courts generally, of course, that veterans' cases involve an element of sympathy not always present in other litigation;[12] that the relationship of the Government to soldiers, if not "paternal," is at least "avuncular" (*White* v. *United States*, 270 U. S. 175); but it has also been recognized that a claim must have been fully-canvassed by the Veterans' Administration and (jus-

[11] The substantial evidence rule is so well established and understood, and so uniformly applied, that failure of restatement, or departures in phraseology, are construed as connoting no change in the rule to be applied. As this Court said in the *Edison Co.* case, *supra*, at p. 229: "We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the court referred to substantial evidence."

[12] In these insurance cases brought by soldiers, every sympathy of the jury is with the plaintiff, and it is particularly imperative that the trial judge observe a scrupulous detachment." *Mason* v. *United States*, 63 F. (2d) 791, 793 (C. C. A. 2). And see also the cases cited in footnote 15, *infra*.

tification for payment not being discovered) must have been denied upon its merits before suit is brought at all."[*] And the courts, differentiating insurance claims, founded on contracts, from gratuities such as pensions and compensation, have uniformly held the former to the established standards of adjudication in the federal courts. Thus, it was said in *United States* v. *LeDuc*, 48 F. (2d) 789, 793 (C. C. A. 8):

> After all, the right of recovery in these war risk insurance cases is dependent on contract, and it is not within the province of the jury to award from the public funds gratuities to relatives of deceased ex-soldiers; neither can we, under the guise of liberal construction, close our eyes to the undisputed facts disclosed by the record in this case and sustain this verdict on the theory of a constructive, permanent, total disability, which finds support only in a series of superimposed retroactive presumptions."

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[*] "In other words, there must be a disagreement between the claimant and the government as to the merits of the claim before a suit may be instituted." *Burgett* v. *United States*, 80 F. (2d) 151, 153 (C. C. A. 7). See Section 19, World War Veterans' Act (38 U. S. C. 445 and 445d).

See also: *Blair* v. *United States*, 47 F. (2d) 109, 111 (C. C. A. 8); *United States* v. *McGivory*, 63 F. (2d) 697, 700 (C. C. A. 1), certiorari denied, 289 U. S. 742; *United States* v. *Clapp*, 63 F. (2d) 793, 795–796 (C. C. A. 2); *United States* v. *Montrose*, 60 F. (2d) 488, 489 (C. C. A. 10); *Live Stock National Bank* v. *United States*, 122 F. (2d) 179, 180 (C. C. A. 7), certiorari denied, 315 U. S. 802; *United*

III. THE RECORD SHOWS A LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT A VERDICT FOR PETITIONER

A. *There is no substantial evidence that any mental disability that might have existed while insurance was in force was then totally disabling, if, indeed, there is any substantial evidence that any mental disability then existed*

Insurance protection expired May 31, 1919. Mental disability was first diagnosed in 1930. Petitioner seeks to have it inferred that the mental disorder diagnosed in 1930 existed in 1919; that the mental disorder thus inferred was totally disabling in 1919; and finally that the inferred total disability from the inferred mental disorder was then permanent in all its totality. Unless the record shows substantial evidence supporting all these inferences the district court's direction of the verdict was clearly correct.

The Government contends that if it be assumed that a mental disability existed in 1919, an assumption resting, we submit, on speculation or conjecture rather than upon inference, there is nevertheless no substantial evidence that any such assumed disability was then totally disabling. As warranting an inference of the existence in May 1919 of the mental disorder first diagnosed in 1930 petitioner relies entirely upon isolated instances of abnormal conduct drawn from long periods during which the insured was otherwise

States v. Crain, 63 F. (2d) 528, 531 (C. C. A. 7); *Hanagan v. United States*, 57 F. (2d) 860, 861 (C. C. A. 7); *United States v. McCreary*, 61 F. (2d) 804, 808 (C. C. A. 9).

pursuing normal activities."[16] Such isolated instances may be regarded as affording substantial evidence of a then existing mental disorder only if they are more consistent with that hypothesis

[16] The insured, whose pre-war activities were those of a completely normal longshoreman, enlisted in the Army in November 1917 and served without incident until the middle of April 1918; the disturbance then occurring at Aizonville, was followed by approximately two months of uneventful active service before the incident on the Marne one evening under circumstances of strain. Notwithstanding that incident the insured continued regular active service until his hospitalization for influenza, whereupon he came under close medical supervision for over three months without observation of any tendency toward abnormality, and thereafter again served without incident until his discharge April 29, 1919, approximately one month before the insurance lapsed, at which time he was found on medical examination to be physically and mentally sound and both he and his commanding officer certified that they had no reason to believe that he was suffering from any wound, injury, or disease.

O'Neill's testimony may be regarded as reflecting abnormal conduct in April and May 1919. Giving full credit to that testimony it may not, we submit, be regarded as providing the basis for an inference of abnormality with respect to any other period. (See *supra*, pp. 12–14.)

The remainder of the evidence relied upon as reflecting abnormal conduct relates to periods subsequent to the expiration of insurance protection. There is no evidence that the insured did not support himself at all times between 1919 and 1930, although the only periods as to which evidence was furnished related to periods of service as a sailor (January to July 1920) and as a soldier in the armed service of the United States (December 1920 to May 1922). There is no evidence that his conduct reflected anything other than normal activities essential to self-support between June and December 1919, July and December 1920, and May 1922 to

than with any other." Colonel Matthews, insured's commanding officer during a substantial portion of his second army enlistment, advanced another hypothesis—namely, that insured was a heavy drinker and probably was using narcotics [16]

January 1930. During the last-named period of eight years the only evidence discloses that the insured married February 14, 1929 (R. 119).

There is in this extremely sketchy record no such continuity in the manifestations of abnormal conduct as that which has been held sufficient to establish the existence during insurance protection of mental disorder subsequently diagnosed. *Cf. Halliday* v. *United States*, 315 U. S. 94, 96–97.

[15] Evidence equally consistent with conflicting hypotheses will not support a verdict based on either. *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343. For applications of this proposition to war risk insurance cases see *Eggen* v. *United States*, 58 F. (2d) 616, 620 (C. C. A. 8); *United States* v. *Barry*, 67 F. (2d) 763, 765 (C. C. A. 6), certiorari denied, 292 U. S. 648.

[16] "It was my opinion that he was doping or drinking to excess" (R. 78).

For evidence as to insured's drinking see R. 73, 75, 111, 124, 126.

Colonel Matthews based his suspicion of the use of narcotics upon substantial experience with dope fiends (R. 74). He observed in the insured physical symptoms—dilation of the pupils of the eyes (R. 80)—which corresponded to those described by petitioner's expert, Dr. Wilder, as being indicative of the use of morphine (R. 70). Upon the question of insured's use of drugs Dr. Wilder took pains to limit his response to an opinion that he was not addicted to drugs at the time of trial, disclaimed ability to judge whether there might have been previous addiction, and explained that if an addict is deprived of a drug "until he gets clear of it" resumption of use is induced merely by association with others using it (R. 71).

(R. 73), with which the evidence is equally if not more consistent.[19]

From these isolated instances, petitioner attempts to draw inferences supporting the hypothesis relied upon by means of the "long range retroactive diagnosis" of Dr. Wilder. Cf. *United States* v. *Hill*, 62 F. (2d) 1022, 1025 (C. C. A. 8); *United States* v. *Hansen*, 70 F. (2d) 230, 231 (C. C. A. 9), certiorari denied, 293 U. S. 604; *United States* v. *Becker*, 86 F. (2d) 818, 820 (C. C. A. 7). Dr. Wilder, however, testified that these isolated instances of nonconformity, considered simply for what they themselves show, were of no diagnostic significance—"do not constitute a symptom

[19] Much of the evidence is inconsistent with the hypothesis relied upon by petitioner—(1) the numerous and lengthy periods of time during which the insured is either shown to have pursued normal activities or is not shown to have manifested any abnormal conduct (see footnote 16, *supra*, pp. 32–33); (2) the absence of any official notation of mental or nervous disorder on the part of the insured by any of his commanding officers during any of his several periods of service; (3) the absence of notation of mental or nervous disorder upon any of a number of physical examinations or at any time during a three months period of hospital treatment for influenza; (4) the marriage of the insured in 1929.

All the foregoing evidence, however, is entirely consistent with the hypothesis that the isolated instances of abnormal conduct on the part of the insured may have been the result of excessive drinking or of drug addiction, or of unusual stress.

The insured was punished for drunkenness in service (R. 73, 126) and all the disciplinary action taken against him during his several periods of service is consistent with the hypothesis that his misconduct (R. 121, 124, 126–127) re-

complex of schizophrenic insanity" (R. 107). He attributed significance to them only by assuming a course of development that is utterly without foundation in the evidence. Dr. Wilder assumed that the O'Neill testimony described a continuous condition from insured's discharge until 1925 (R. 97, 101) although O'Neill was without personal knowledge that in the three years immediately following discharge insured had served in the Army or Navy (R. 25) approximately 23 months (R. 122–126), admitted "I don't know just when or how often I seen him except when he first come

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sulted from addiction to intoxicants. In this connection it is significant that the first infraction of discipline—absence without official leave—occurred in February 1918 (R. 121) at a time when according to all of the pertinent testimony (R. 42, 43, 66) (including the opinion of Dr. Wilder) he was mentally normal. The testimony of the witness Weils with respect to the incident in April 1918 (R. 32, 36, 39–41) is likewise consistent with the hypothesis suggested by Col. Matthews.

The condition of the insured in April and May 1919 as described by the witness O'Neill is not inconsistent with a condition resulting from excessive and prolonged drinking.

The testimony of the witness Tanikawa with respect to the incident described by him as occurring on the Marne in June 1918 fits less readily into the hypothesis that it may have resulted from drinking or the use of drugs, since it seems unlikely that the insured would have had ready access to either. The facts, however, that this incident—occurring under circumstances of unusual stress—did not interrupt the insured's active service as a soldier and is not even reflected in the official record, establish that it was not contemporaneously regarded officially as a manifestation of mental disorder.

home for the first couple of months" (R. 24), and fixed the termination of his association with insured at insured's drifting "out West somewheres around California" (R. 20); insured's second army enlistment terminated in California in 1922 (R. 127) and there is no definite indication that he ever returned to Philadelphia thereafter. The Doctor assumed that the condition described by O'Neill made it impossible for him to hold a job (R. 97, 101), whereas O'Neill specifically testified that he did not know whether insured was working in 1919 following his discharge (R. 20). He further assumed with no foundation in the record that insured's earnings were limited over a period of 20 years (R. 101), that he was never able to hold any kind of a job after his return from the War (R. 97)[20] and that there had been "the same recurring thing in one form or another over a period of twenty years" (R. 107–108). The crucial importance of these assumptions is indicated by the Doctor's testimony that his diagnoses might be quite different if it were known that insured was working regularly from 1925 to 1930 (R. 102)[21] and that diagnoses based on the incidents

[20] This, of course, is substantially the point at issue in the litigation. Expert testimony based on such an assumption is devoid of probative value. *United States* v. *Koskey*, 71 F. (2d) 501, 502 (C. C. A. 9).

[21] In other instances, also, the doctor disclosed that he was testifying from a general impression rather than with reasonable attention to the evidence upon which he was asked to base an opinion. Thus testimony that, immediately after

preceding the lapse of insurance would be impossible without the subsequent history (R. 102–103).

If, however, notwithstanding these very substantial impediments to an inference that any mental disorder existed prior to the expiration of insurance protection on May 31, 1919, it be assumed that all conduct shown by the record involving any departure from normal behavior constituted recurring manifestations of then existing dementia praecox, such manifestations do not, in any event, constitute substantial evidence of total disability in that period.[22] The insurance policy

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his return from service in May 1919, the insured was wearing his uniform and a decoration from the division in which he had served, was construed as showing slovenly dress (R. 63). Consider also the assumption that a mental disease had originated in 1918 and had existed continuously thereafter (R. 101), although there was no proof whatever that it had existed, or at least that it had not been in a state of remission for many years prior to 1930. Dr. Wilder assumed that the insured cursed his officers and blacked the eye of one of them, and attributed considerable significance thereto (R. 66). It is at best very doubtful that even this assumption is supported by the evidence (R. 41). As to the inferences to be drawn therefrom regarding insured's disposition, compare the testimony of Colonel James Matthews (R. 79) and of Sergeant Shipp (R. 113).

[22] The evidence covers the period extending from 1918 to 1922. The evidence relating to the period of insurance protection includes only the Aizonville and Marne incidents, which did not interrupt the insured's active service, and some part of the testimony of O'Neill. To establish total permanent disability petitioner must, of course, show total disability occurring before the expiration of insurance protection, continuously existing to the time of determination and reasonably certain to continue for life.

held by the insured does not mature upon the occurrence of a partially disabling condition which develops into a total-permanent disability after the expiration of insurance protection. It does not insure against the incipience of injury or disease later causing total permanent disability or death but only against death or total permanent disability while the insurance is in force. *United States* v. *Spaulding*, 293 U. S. 498, 504–505; *Wilks* v. *United States*, 65 F. (2d) 775, 776 (C. C. A. 2).

That insured was not totally disabled during the period covered by the evidence appears conclusively from the undisputed facts contained in the record. With no recorded interruptions resulting from the Aizonville and Marne incidents the insured served out his period of enlistment as a regular soldier both during the period of active hostilities and thereafter, manifesting no disability other than influenza. In April 1919 he was honorably discharged after medical examination which found him to be physically and mentally sound and upon his and his commanding officer's certification that they neither knew nor had any reason to believe that he was suffering from any impairment. There is no indication that he had any unearned source of livelihood for the remainder of the year 1919, and O'Neill's observations clearly were not indicative of disability inconsistent with the pursuit of insured's occupation as longshoreman,

since O'Neill testified that he did not know whether insured was working or not. In January 1920 the insured was examined for acceptance in the United States Navy, enlisted, and, although presenting some disciplinary problems, apparently performed all the regular duties of a sailor until July of that year. Thereafter there is again no showing that he was unable to, or did not in fact, earn his living by his own activities until December 7, 1920, when he was again medically examined, found to be physically and mentally fit for service in the United States Army, enlisted, and served continuously as a soldier until May 1922. During this period of service it appears not only that he performed the regular duties of a soldier in the United States Army, but that he performed them well. The record includes the testimony of the officer immediately in charge of the insured, who probably knew more about the quality of his service than anyone else. This officer, Sergeant Shipp, testified that while the insured drank he did not drink on duty; that he appeared to be a normal soldier; that he took his orders and did his duty as a regular soldier; that he was dependable (R. 111–113). Both Sergeant Shipp and Colonel James Matthews, the insured's company commander, were questioned as to whether they had any reason to suspect that the insured might be insane. They both denied very positively that they ever had any grounds for entertaining such

a suspicion and both indicated that insured got along well with his fellow soldiers (R. 75, 79, 111–113).

Insofar as Dr. Wilder's testimony expressing a conclusion of the existence since 1918 of insanity to the point of occupational inadaptability (R. 99; see also R. 95, 98) may be relied upon as a foundation for an inference conflicting with the ability to perform the very substantial regular service in fact performed, it may be completely eliminated upon the ground stated by this Court in *United States* v. *Spaulding, supra* at p. 506:

> As against the facts directly and conclusively established, this opinion evidence furnishes no basis for opposing inferences.[23]

B. *There is no evidence of the permanence of total disability as of May 31, 1919*

Even if it be assumed not only that the insured, prior to May 31, 1919, manifested dementia praecox, but also that the disease was then totally disabling, there is nevertheless a fatal deficiency in petitioner's case by reason of the failure to pre-

[23] In addition, it may be noted that Dr. Wilder's opinion was expressed only upon petitioner's evidence and before defendant's case had been introduced; of course in its ultimate conclusion it is subject to the same infirmities which have been set forth *supra* (pp. 34–37) with respect to the question of whether the doctor's testimony affords any basis for inferring the existence of any mental disorder occurring before the expiration of insurance protection.

sent any evidence regarding the insured's condition over a period concededly embracing five years (R. 101) and actually, as may be shown upon analysis,[24] extending for a period of eight years. Under the contract upon which petitioner sues it is not enough that there be a showing of total disability while insurance is in force even though caused by an incurable disease; permanence of totality must be shown. This requires a showing that total disability occurring while the contract was in force was then reasonably certain to continue and did in fact continue to the date of determination. *Personius* v. *United States*, 65 F. (2d) 646 (C. C. A. 9); *Denny* v. *United States*, 103 F. (2d) 960 (C. C. A. 7). Cf. *Ginell* v. *Prudential Ins. Co.*, 237 N. Y. 554; *Hawkins* v. *John Hancock Inc. Co.*, 205 Iowa 760. Obviously this requirement cannot be met upon a record which, with respect to the period 1922 to 1930, shows only that insured married the petitioner during that time.

If the insured had dementia praecox prior to May 31, 1919, it was obviously and admittedly in its earliest stages and it is not shown to have reached the stage of medical diagnosis of any mental disorder prior to 1930, eleven years later (R. 84–94). Dr. Wilder, petitioner's expert medical witness, who expressed the opinion that the insured's present condition began in 1918, testified

[24] See *supra*, pp. 12–14.

that he was still going down hill in 1941 (R. 66). Yet Dr. Wilder did not express an opinion that the condition was permanent as of any date earlier than 1941, and his testimony even with respect to 1941 recognized a possibility, though not a probability, of recovery through the application of newly developed treatments (R. 109).

It is a well-known fact, recognized in a number of cases, that dementia praecox is subject to periods of remission during which a person may live a normal life and pursue normal activities. *United States* v. *Gwin*, 68 F. (2d) 124, 126 (C. C. A. 6); *Poole* v. *United States*, 65 F. (2d) 795 (C. C. A. 4), certiorari denied, 291 U. S. 658; *Grant* v. *United States*, 74 F. (2d) 302, 303 (C. C. A. 5), certiorari denied, 295 U. S. 735; *Atkins* v. *United States*, 70 F. (2d) 768 (App. D. C.); *Denny* v. *United States*, 103 F. (2d) 960, 964 (C. C. A. 7). See also *United States* v. *Cochran*, 63 F. (2d) 61 (C. C. A. 10). Compare: *United States* v. *Kiles*, 70 F. (2d) 880 (C. C. A. 8). Assuming that the testimony of O'Neill, Wells, and Tanikawa warrants an inference that Galloway suffered during the life of the contract from dementia praecox rather than the effects merely of recurring periods of excessive drinking or of drug addiction, the evidence is nevertheless consistent only with the view that he was achieving progressively lengthening periods of remission during the period of more than a decade thereafter. It is the theory of petitioner's case that in 1919 the insured was in

the acute phases of break-down (R. 66), and there was testimony indicating that the longest periods of remission were "a couple of months" (R. 20). The undisputed fact that in less than two years thereafter the insured performed eight months of satisfactory service as a soldier under Sergeant Shipp shows a continuance by geometric progression of the lengthening of the periods of remission. No reversal of this process is shown prior to 1930 and its continuance is indicated by the marriage of the insured in 1929.

It was recognized in *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9), affirmed without opinion, 291 U. S. 646, that a verdict should be directed for the United States in a suit on a contract of war risk insurance where the evidence showed total disability during the life of the contract and proof of subsequent total permanent disability, but proof was lacking of the permanence of total disability while the contract was in force. This interpretation of the policy has been applied in the decision of numerous cases antedating and following the *Falbo* decision. *Eggen* v. *United States*, 58 F. (2d) 616 (C. C. A. 8); *United States* v. *Clapp*, 63 F. (2d) 793 (C. C. A. 2); *United States* v. *Elmore*, 68 F. (2d) 551 (C. C. A. 5); *United States* v. *Rentfrow*, 60 F. (2d) 488 (C. C. A. 10); *United States* v. *Russian*, 73 F. (2d) 363 (C. C. A. 3); *United States* v. *Sumner*, 69 F. (2d) 770 (C. C. A. 6); *United States* v. *Baker*, 73 F. (2d) 455 (C. C. A. 4); *United States* v. *Clements*, 96 F.

(2d) 533 (App. D. C.), certiorari denied, 305 U. S. 610; *United States* v. *Kiles*, 70 F. (2d) 880 (C. C. A. 8).

It was thus incumbent upon petitioner to make some showing of what the insured's condition and activities in fact were from 1922 to 1930. This is part of the burden of making a case upon which a jury can pass. To render a verdict the jury would have to conclude that he was or was not totally disabled over that entire period, and in the absence of evidence any conjecture as to whether he was or was not working, or was or was not able to work, would be the wildest sort of guess. If any inference can be drawn from the one fragment of evidence relating to the period, namely that insured married the petitioner, the inference would necessarily be adverse to petitioner; she was clearly in a position to testify from the closest personal association what insured's condition was at least at the time of marriage and thereafter, yet she did not take the stand.

IV. CONTRARY TO PETITIONER'S CONTENTION, THE DECISIONS BELOW ARE COMPLETELY IN ACCORD WITH THE DECISIONS IN BERRY *v.* UNITED STATES, 312 U. S. 450, AND HALLIDAY *v.* UNITED STATES, 313 U. S. 94

The decisions of this Court in the *Berry* and *Halliday* cases, as in the earlier war risk insurance cases of *Falbo* and *Miller* (*supra* p. 28), and the decision of the Circuit Court of Appeals in the present case, are in harmony with the rule stated in the *Patton* case (*supra* pp. 27–28) that great re-

spect must be paid to the ruling by the district court upon a motion for a directed verdict. The instant case, like the *Falbo* and *Miller* cases and unlike the *Berry* and *Halliday* cases, invokes the additional consideration enunciated in the *Patton* case, that, "if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

Factually, the present case and *Berry* v. *United States* have no elements in common providing a basis either for contrast or for comparison that would substantially aid in the determination of the question here presented. Certainly the disabilities involved in the two cases are widely different in nature, and hence the character of the evidence offered also differs widely.

The variation is such, we believe, that considerations wholly different from those involved in the *Berry* case determine the probative value of the evidence herein. In the *Berry* case, there was no question, as here, regarding the probative value of opinion testimony, necessitating consideration of the factual foundation for it and its inconsistency with established facts. Neither was there, in the *Berry* case, occasion to consider whether permanency of the disability was shown, and thus to determine the character of proof required to show permanency. Here it is urged that the lack of proof of permanency of any total

disability that might have existed during the life of the policy is, in itself, a fatal deficiency in petitioner's proof.

The present case and *Halliday* v. *United States*, however, have a number of factors in common so that this Court's decision in the one may properly be drawn upon in solving the problem in the other. We submit that in each pertinent particular the evidence in the present case differs from that in the *Halliday* case and that, accordingly, because of the absence here of evidence of the character upon which the decision was based in the *Halliday* case, the two cases present a contrast adverse to petitioner's contentions and favorable to the result reached by the courts below.

In the *Halliday* case, opinion testimony regarding the insured's disability while his insurance was in force was given by a medical expert who, as the family physician, had known the insured from infancy and who had opportunity to observe him both while the insurance was in force and at frequent intervals thereafter. In the present case, petitioner relies upon the opinion—lacking adequate foundation—of an expert who first saw the insured more than twenty years after his insurance lapsed, when he examined him for the purpose of testifying.

In the *Halliday* case, records of hospital treatment of the insured for a back injury, while his insurance was in force, recited that he was "very nervous" and that he gave "impressions of neuras-

thenia". The insured in the present case likewise received hospital treatment over an extended period of time while his insurance was in force, but the records relating to it contain nothing to indicate that he was suffering from mental or nervous disorder of any character.

In the *Halliday* case, records reflecting that the insured was found to be very nervous prior to the lapse of his policy, were supplemented by records showing that his condition was regarded periodically upon examination by mental experts as reflecting hypochondriasis and related ailments over a period commencing less than two years after the insurance lapsed. In the present case, records containing nothing to show nervous or mental disability while the insurance was in force, are supplemented by other records showing that periodically, as late as December 1920, the insured was found upon medical examination to be physically and mentally sound. It is not shown in this case that the insured was found by a medical examiner to have any mental or nervous disability until 1930.

In the *Halliday* case, there was no evidence comparable with that here presented showing that subsequent to the time when total permanent disability is alleged to have occured, the insured twice enlisted in the armed forces and actually performed regular duty therein in a manner indicating to his superior officers that he had no mental derangement whatever.

In the *Halliday* case, there was no extended period of time with respect to which no proof at all was offered. In the present case, petitioner's proof leaves a period of eight years wholly blank.

CONCLUSION

It is respectfully submitted that the district court properly directed the jury to return a verdict for the respondent and, therefore, that the judgment below should be affirmed.

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MARCH 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 553.—October Term, 1942.

Joseph Galloway, by Freda Galloway, his Guardian, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 24, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

Petitioner seeks benefits for total and permanent disability by reason of insanity he claims existed May 31, 1919. On that day his policy of yearly renewable term insurance lapsed for nonpayment of premium.[1]

The suit was filed June 15, 1938. At the close of all the evidence the District Court granted the Government's motion for a directed verdict. Judgment was entered accordingly. The Circuit Court of Appeals affirmed. 130 F. 2d 467. Both courts held the evidence legally insufficient to sustain a verdict for petitioner. He says this was erroneous and, in effect, deprived him of trial by jury, contrary to the Seventh Amendment.

The constitutional argument, as petitioner has made it, does not challenge generally the power of federal courts to withhold or withdraw from the jury cases in which the claimant puts forward insufficient evidence to support a verdict.[2] The contention is merely that his case as made was substantial, the courts' decisions to the contrary were wrong, and therefore their effect has been to deprive him of a jury trial. Petitioner relies particularly upon *Halliday* v. *United States*, 315 U. S. 94, and *Berry* v. *United*

[1] The contract was issued pursuant to the War Risk Insurance Act and insured against death or total permanent disability. (Act of Oct. 6, 1917, c. 105, § 400, 40 Stat. 398, 409.) Pursuant to statutory authority (Act of May 20, 1918, c. 77, § 13, 40 Stat. 555), T. D. 20 W. R., promulgated March 9, 1918, provided:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed . . . to be total disability.

"Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. . . ." (Regulations and Procedure, U. S. Veterans Bureau, Part I, p. 9.)

[2] See, however, Part III, *infra*.

States, 312 U. S. 450, citing also *Gunning* v. *Cooley*, 281 U. S. 90. These cases and others relied upon are distinguishable upon the facts, as will appear. Upon the record and the issues as the parties have made them, the only question is whether the evidence was sufficient to sustain a verdict for petitioner. On that basis, we think the judgments must be affirmed.

I.

Certain facts are undisputed. Petitioner worked as a longshoreman in Philadelphia and elsewhere prior to enlistment in the Army November 1, 1917.[3] He became a cook in a machine gun battalion. His unit arrived in France in April, 1918. He served actively until September 24. From then to the following January he was in a hospital with influenza. He then returned to active duty. He came back to the United States, and received honorable discharge April 29, 1919. He enlisted in the Navy January 15, 1920, and was discharged for bad conduct in July. The following December he again enlisted in the Army and served until May, 1922, when he deserted. Thereafter he was carried on the Army records as a deserter.

In 1930 began a series of medical examinations by Veterans' Bureau physicians. On May 19 that year his condition was diagnosed as "Moron, low grade; observation, dementia praecox, simple type." In November, 1931, further examination gave the diagnosis, "Psychosis with other diseases or conditions (organic disease of the central nervous system—type undetermined)." In July, 1934, still another examination was made, with diagnosis: "Psychosis-manic and depressive insanity incompetent; hypertension, moderate; otitis media, chronic, left; varicose veins left, mild; abscessed teeth roots; myocarditis, mild."

Petitioner's wife, the nominal party in this suit, was appointed guardian of his person and estate in February, 1932. Claim for insurance benefits was made in June, 1934, and was finally denied by the Board of Veterans' Appeals in January, 1936. This suit followed two and a half years later.

Petitioner concededly is now totally and permanently disabled by reason of insanity and has been for some time prior to institution of this suit. It is conceded also that he was sound in mind and body until he arrived in France in April, 1918.

[3] The record does not show whether this employment was steady and continuous or was spotty and erratic. But there is no contention petitioner's behavior was abnormal before he arrived in France in April, 1918.

The theory of his case is that the strain of active service abroad brought on an immediate change, which was the beginning of a mental breakdown that has grown worse continuously through all the later years. Essential in this is the view it had become a total and permanent disability not later than May 31, 1919.

The evidence to support this theory falls naturally into three periods, namely, that prior to 1923; the interval from then to 1930; and that following 1930. It consists in proof of incidents occurring in France to show the beginnings of change; testimony of changed appearance and behavior in the years immediately following petitioner's return to the United States as compared with those prior to his departure; the medical evidence of insanity accumulated in the years following 1930; and finally the evidence of a physician, given largely as medical opinion, which seeks to tie all the other evidence together as foundation for the conclusion, expressed as of 1941, that petitioner's disability was total and permanent as of a time not later than May of 1919.

Documentary exhibits included military, naval and Veterans' Bureau records. Testimony was given by deposition or at the trial chiefly by five witnesses. One, O'Neill, was a fellow worker and friend from boyhood; two, Wells and Tanikawa, served with petitioner overseas; Lt. Col. Albert K. Mathews, who was an Army chaplain, observed him or another person of the same name at an Army hospital in California during early 1920; and Dr. Wilder, a physician, examined him shortly before the trial and supplied the only expert testimony in his behalf. The petitioner also put into evidence the depositions of Commander Platt and Lt. Col. James E. Matthews, his superior officers in the Navy and the Army, respectively, during 1920-22.

What happened in France during 1918-19 is shown chiefly by Wells and Tanikawa. Wells testified to an incident at Aisonville, where the unit was billeted shortly after reaching France and before going into action. Late at night petitioner created a disturbance, "hollering, screeching, swearing. . . . The men poured out from the whole section." Wells did not see the incident, but heard petitioner swearing at his superior officers and saw "the result, a black eye for Lt. Warner." However, he did not see "who gave it to him."[4] Wells personally observed no infraction of discipline except this incident, and did not know what brought it on.

[4] Wells heard of another incident at Monthurel in June, but his testimony concerning this was excluded as hearsay.

Petitioner's physical appearance was good, he "carried on his duties as a cook all right," and the witness did not see him after June 1, except for about three days in July when he observed petitioner several times at work feeding stragglers.

Tanikawa, Hawaiian-born citizen, served with pe[illegible] from the latter's enlistment until September, 1918, when Galloway was hospitalized, although the witness thought they had fought together and petitioner was "acting queer" at the Battle of the Argonne in October. At Camp Greene, North Carolina, petitioner was "just a regular soldier, very normal, . . . pretty neat." After reaching France "he was getting nervous . . ., kind of irritable, always picking a fight with other soldiers." This began at Aisonville. Tanikawa saw Galloway in jail, apparently before June. It is not clear whether these are references to the incident Wells described.

Tanikawa described another incident in June "when we were on the Marne," the Germans "were on the other side and we were on this side." It was a new front, without trenches. The witness and petitioner were on guard duty with others. Tanikawa understood the Germans were getting ready for a big drive. "One night he [petitioner] screamed. He said, 'The Germans are coming' and we all gagged him." There was no shooting, the Germans were not coming, and there was nothing to lead the witness to believe they were. Petitioner was court martialed for the matter, but Tanikawa did not know "what they did with him." He did not talk with Galloway that night, because "he was out of his mind" and appeared insane. Tanikawa did not know when petitioner left the battalion or what happened to him after (as the witness put it) the Argonne fight, but heard he went to the hospital, "just dressing station I guess." The witness next saw Galloway in 1936, at a disabled veterans' post meeting in Sacramento, California. Petitioner then "looked to me like he wasn't all there. Insane. About the same . . . as compared to the way he acted in France, particularly when they gagged him . . . ."

O'Neill was "born and raised with" petitioner, worked with him as a longshoreman, and knew him "from when he come out of the army for seven years, . . . I would say five or six years." When petitioner returned in April or May, 1919, "he was a wreck compared to what he was when he went away. The fellow's mind was evidently unbalanced." Symptoms specified were withdraw-

ing to himself; crying spells; alternate periods of normal behavior and nonsensical talk; expression of fears that good friends wanted "to beat him up"; spitting blood and remarking about it in vulgar terms. Once petitioner said, "G-- d-- it, I must be a Doctor Jekyll and Mr. Hyde."

O'Neill testified these symptoms and this condition continued practically the same for about five years. In his opinion petitioner was "competent at times and others was incompetent." The intervals might be "a couple of days, a couple of months." In his normal period Galloway "would be his old self . . . absolutely O. K."

O'Neill was definite in recalling petitioner's condition and having seen him frequently in 1919, chiefly however, and briefly, on the street during lunch hour. He was not sure Galloway was working and was "surprised he got in the Navy, I think in the Navy or in the Government service."

O'Neill maintained he saw petitioner "right on from that [1920] at times." But his recollection of dates, number of opportunities for observation, and concrete events was wholly indefinite. He would fix no estimate for the number of times he had seen petitioner: "In 1920 I couldn't recall whether it was one or a thousand." For later years he would not say whether it was "five times or more or less." When he was pinned down by cross-examination, the effect of his testimony was that he recalled petitioner clearly in 1919 "because there was such a vast contrast in the man," but for later years he could give little or no definite information. The excerpt from the testimony set forth in the margin[5] shows this

[5] "X Can you tell us approximately how many times you saw him in 1919?
"A. No; I seen him so often that it would be hard to give any estimate.
"X And the same goes *for 1920?*
"A. *I wouldn't be sure about 1920. I remember him more when he first came home because there was such a vast contrast in the man.* Otherwise, if nothing unusual happened, I wouldn't probably recall him at all, you know, that is, recall the particular time and all.
"X Well, do you recall him *at all in 1920?*
"A. *I can't say.*
"X And could you swear whether or not you ever saw him *in 1921?*
"A. I think I seen him both in 1921 and 1920 and 1921 and right on. I might not see him for a few weeks or months at a time, but I think I saw him a few times in all the years right up to, as I say, at least five years after.
"X Can you give us *an estimate* as to the number of times you saw him *in 1920?*
"A. *No, I would not.*
"X Was it *more than five times or less?*
"A. In 1920 *I couldn't recall whether it was one or a thousand. The*

contrast. We also summarize below[6] other evidence which explains or illustrates the vagueness of the witness' recollection for events after 1919. O'Neill recalled one specific occasion after 1919 when petitioner returned to Philadelphia, "around 1920 or 1921, but I couldn't be sure," to testify in a criminal proceeding. He also said, "After he was away for five or six years, he came back to Philadelphia, but I wouldn't know nothing about dates on that. He was back in Philadelphia for five or six months or so, and he was still just evidently all right, and then he would be off."

Lt. Col. (Chaplain) Mathews said he observed a Private Joseph Galloway, who was a prisoner for desertion and a patient in the mental ward at Fort MacArthur Station Hospital, California, during a six weeks period early in 1920. The chaplain's testimony gives strong evidence the man he observed was insane. However, there is a fatal weakness in this evidence. In his direct testimony, which was taken by deposition, the chaplain said he was certain that the soldier was petitioner. When confronted with the undisputed fact that petitioner was on active duty in the Navy during the first half of 1920, the witness at first stated that he might have been mistaken as to the time of his observation. Subsequently he reasserted the accuracy of his original statement as to the time of observation, but admitted that he might have been mistaken in believing that the patient-prisoner was petitioner. In this con-

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time I recall him well is when he first come home, but I know that I seen him right on from that at times.

"X And the same goes for 1921, 1922, 1923 and 1924?

"A. I would say for five years afterwards, but I don't know just when or how often I seen him except when he first come home for the first couple of months.

"X *But for years after his return you couldn't say definitely whether you saw him five times or more or less, could you?*

A. *No*, because it was a thing that *there was a vast contrast when he first come home* and everybody noticed it and remarked about it and it was more liable to be remembered. You could ask me about some more friends I knew during those years and I wouldn't know except there was something unusual." (Emphasis added.)

[6] Petitioner's own evidence shows without dispute he was on active duty in the Navy from January 15, 1920, to July of that year and in the Army from December, 1920, to May 6, 1922. As is noted in the text, O'Neill was not sure he was working and "was surprised he got in the Navy, I think in the Navy or in the Government service." He only "heard some talk" of petitioner's having reenlisted in the Army, but "*if it was the fact*, I would be surprised that he could do it owing to his mental condition." (Emphasis added.) O'Neill was not certain that he saw Galloway in uniform after the first week of his return to Philadelphia from overseas, although he said he saw petitioner during "the periods of those reenlistments . . . but I can't recall about it."

nection he volunteered the statement, "Might I add, sir, that I could not now identify that soldier if I were to meet him face to face, and that is because of the long lapse of time." The patient whom the witness saw was confined to his bed. The record is barren of other evidence, whether by the hospital's or the Army's records or otherwise, to show that petitioner was either patient or prisoner at Fort MacArthur in 1920 or at any other time.

Commander Platt testified that petitioner caused considerable trouble by disobedience and leaving ship without permission during his naval service in the first half of 1920. After "repeated warnings and punishments, leading to court martials," he was sentenced to a bad conduct discharge.

Lt. Col. James E. Matthews (not the chaplain) testified by deposition which petitioner's attorney interrupted Dr. Wilder's testimony to read into evidence. The witness was Galloway's commanding officer from early 1921 to the summer of that year, when petitioner was transferred with other soldiers to another unit. At first Colonel Matthews considered making petitioner a corporal, but found him unreliable and had to discipline him. Petitioner "drank considerably," was "what we called a bolshevik," did not seem loyal, and "acted as if he was not getting a square deal." The officer concluded "he was a moral pervert and probably used narcotics," but could not secure proof of this. Galloway was court martialed for public drunkenness and disorderly conduct, served a month at hard labor, and returned to active duty. At times he "was one of the very best soldiers I had," at others undependable. He was physically sound, able to do his work, perform close order drill, etc., "very well." He had alternate periods of gaiety and depression, talked incoherently at times, gave the impression he would fight readily, but did not resent orders and seemed to get along well with other soldiers. The officer attributed petitioner's behavior to alcohol and narcotics and it occurred to him at no time to question his sanity.

Dr. Wilder was the key witness. He disclaimed specializing in mental disease, but qualified as having given it "special attention." He first saw petitioner shortly before the trial, examined him "several times." He concluded petitioner's ailment "is a schizophrenic branch or form of praecox." Dr. Wilder heard the testimony and read the depositions of the other witnesses, and examined the documentary evidence. Basing his judgment upon this

material, with inferences drawn from it, he concluded petitioner was born with "an inherent instability," though he remained normal until he went to France; began there "to be subjected to the strain of military life, then he began to go to pieces." In May, 1919, petitioner "was still suffering from the acuteness of the breakdown . . . . . He is going down hill still, but the thing began with the breakdown . . . . . " Petitioner was "definitely insane, yes, sir," in 1920 and "has been insane at all times, at least since July, 1918, the time of this episode on the Marne"; that is, "to the point that he was unable to adapt himself. I don't mean he has not had moments when he could not perform some routine tasks," but "from an occupational standpoint . . . he has been insane." He could follow "a mere matter of routine," but would have no incentive, would not keep a steady job, come to work on time, or do anything he didn't want to do. Dr. Wilder pointed to petitioner's work record before he entered the service and observed: "At no time after he went into the war do we find him able to hold any kind of a job. He broke right down." He explained petitioner's enlistment in the Navy and later in the Army by saying, "It would have been no trick at all *for a man who was reasonably conforming* to get into the Service." (Emphasis added.)

However, the witness knew "nothing whatever except his getting married" about petitioner's activities between 1925 and 1930, and what he knew of them between 1922 and 1925 was based entirely on O'Neill's testimony and a paper not of record here.[7] Dr. Wilder at first regarded knowledge concerning what petitioner was doing between 1925 and 1930 as not essential. "We have a continuing disease, quite obviously beginning during his military service, and quite obviously continuing in 1930, and *the minor incidents* don't seem to me ——" (Emphasis added.) Counsel for the government interrupted to inquire, "Well, if he was continuously employed for eight hours a day from 1925 to 1930 would that have any bearing?" The witness replied, "It would have a great deal." Upon further questioning, however, he reverted to his first position stating it would not be necessary or helpful for him to know what petitioner was doing from 1925 to 1930: "I testified from the information I had."

[7] It is to be noted the witness did not refer to Chaplain Mathews' testimony.

II.

This, we think, is the crux of the case and distinguishes it from the cases on which petitioner has relied.[8] His burden was to prove total and permanent disability as of a date not later than May 31, 1919. He has undertaken to do this by showing incipience of mental disability shortly before that time and its continuance and progression throughout the succeeding years. He has clearly established incidence of total and permanent disability as of some period prior to 1938, when he began this suit.[9] For our purposes this may be taken as medically established by the Veterans' Bureau examination and diagnosis of July, 1934.[10]

But if the record is taken to show that some form of mental disability existed in 1930, which later became total and permanent, petitioner's problem remains to demonstrate by more than speculative inference that this condition itself began on or before May 31, 1919 and continuously existed or progressed through the intervening years to 1930.

To show origin before the crucial date, he gives evidence of two abnormal incidents occurring while he was in France, one creating the disturbance before he came near the fighting front, the other yelling that the Germans were coming when he was on guard duty at the Marne. There is no other evidence of abnormal behavior during his entire service of more than a year abroad.

[8] None of them exhibits a period of comparable length as to which evidence is wholly lacking and under circumstances which preclude inference the omission was unintentional.

[9] He has not established a fixed date at which contemporaneous medical examination, both physical and mental, establishes totality and permanence prior to Dr. Wilder's examinations in 1941.

Dr. Wilder testified that on the evidence concerning petitioner's behavior at the time of his discharge in 1919, and without reference to the testimony as to later conduct, including O'Neill's, he would reserve his opinion on whether petitioner was then "crazy"—"I wouldn't have enough—"

[10] The previous examinations of 1930 and 1931 show possibility of mental disease in the one case and existence of psychosis with other disease, organic in character but with type undetermined, in the other. These two examinations without more do not prove existence of total and permanent disability; on the contrary, they go far toward showing it could not be established then medically.

The 1930 diagnosis shows only that the examiner regarded petitioner as a moron of low grade, and recommended he be observed for simple dementia praecox. Dr. Wilder found no evidence in 1941 that petitioner was a moron. The 1931 examination is even less conclusive in one respect, namely, that "psychosis" takes the place of moronic status. Dr. Wilder also disagreed with this diagnosis. However, this examination first indicates existence of organic nervous disease. Not until the 1934 diagnosis is there one which might be regarded as showing possible total and permanent disability by medical evidence contemporaneous with the fact.

That he was court martialed for these sporadic acts and bound and gagged for one does not prove he was insane or had then a general breakdown in "an already fragile mental constitution," which the vicissitudes of a longshoreman's life had not been able to crack.

To these two incidents petitioner adds the testimony of O'Neill that he looked and acted like a wreck, compared with his former self, when he returned from France about a month before the crucial date, and O'Neill's vague recollections that this condition continued through the next two, three, four, or five years.

O'Neill's testimony apparently takes no account of petitioner's having spent 101 days in a hospital in France with influenza just before he came home. But, given the utmost credence, as is required, it does no more than show that petitioner was subject to alternating periods of gaiety and depression for some indefinite period after his return, extending perhaps as late as 1922. But because of its vagueness as to time, dates, frequency of opportunity for observation, and specific incident, O'Neill's testimony concerning the period from 1922 to 1925 is hardly more than speculative.

We have then the two incidents in France followed by O'Neill's testimony of petitioner's changed condition in 1919 and its continuance to 1922.[11] There is also the testimony of Commander Platt and Lt. Col. James E. Matthews as to his service in the Navy and the Army, respectively, during 1920-1922. Neither thought petitioner was insane or that his conduct indicated insanity. Then follows a chasm of eight years. The only evidence[12] we have concerning this period is the fact that petitioner married his present guardian at some time within it, an act from which in the legal sense no inference of insanity can be drawn.

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[11] Chaplain Mathews' testimony would be highly probative of insanity existing early in 1920, if petitioner were sufficiently identified as its subject. However, the bare inference of identity which might otherwise be drawn from the mere identity of names cannot be made reasonably in view of its overwhelming contradiction by other evidence presented by petitioner and the failure to produce records from Fort MacArthur Hospital or the Army or from persons who know the fact that petitioner had been there at any time. The omission eloquently testifies in a manner which no inference could overcome that petitioner never was there. The chaplain's testimony therefore should have been stricken, had the case gone to the jury, and petitioner can derive no aid from it here.

Tanikawa, it may be recalled, did not profess to have seen petitioner between October, 1918, and 1936.

[12] Apart from O'Neill's vague recollection of petitioner's return to Philadelphia on one occasion.

This period was eight years of continuous insanity, according to the inference petitioner would be allowed to have drawn. If so, he should have no need of inference. Insanity so long and continuously sustained does not hide itself from the eyes and ears of witnesses.[13] The assiduity which produced the evidence of two "crazy" incidents during a year and a half in France should produce one during eight years or, for that matter, five years in the United States.

Inference is capable of bridging many gaps. But not, in these circumstances, one so wide and deep as this. Knowledge of petitioner's activities and behavior from 1922 or 1925 to 1930 was peculiarly within his ken and that of his wife, who has litigated this cause in his and presumably, though indirectly, in her own behalf. His was the burden to show continuous disability. What he did in this time, or did not do, was vital to his case. Apart from the mere fact of his marriage, the record is blank for five years and almost blank for eight. For all that appears, he may have worked full time and continuously for five and perhaps for eight, with only a possible single interruption.[14]

No favorable inference can be drawn from the omission. It was not one of oversight or inability to secure proof. That is shown by the thoroughness with which the record was prepared for all other periods, before and after this one, and by the fact petitioner's wife, though she married him during the period and was available, did not testify. The only reasonable conclusion

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[13] The only attempt to explain the absence of testimony concerning the period from 1922 to 1930 is made by counsel in the reply brief: "The insured, it will be observed, was never apprehended after his desertion from the Army in 1922. It is only reasonable that a person with the status of a deserter at large . . . . , whose mind was in the condition of that of this insured, would absent himself from those with whom he would usually associate because of fear of apprehension and punishment. His mental condition . . . at the time of trial . . . clearly shows that he could not have testified. . . . A lack of testimony from 1922 to 1930 is thus explained, and the jury could well infer that only the then [1941] admittedly insane insured was in a position to know where he was and what he was doing during those years; as he had lost his mental faculties, the reason for lack of proof during these years is apparent."

The "explanation" is obviously untenable. It ignores the one fact proved with relation to the period, that petitioner was married during it. His wife was nominally a party to the suit, and obviously available as a witness. It disregards the fact petitioner continued in the status of deserter after 1930, yet produced evidence relating to the period from that time on. It assumes he was insane during the eight years, yet succeeded during that long time in absenting himself from persons who could testify in his favor.

[14] *Cf.* note 12, *supra.*

is that petitioner, or those who acted for him, deliberately chose, for reasons no doubt considered sufficient (and which we do not criticize, since such matters, including tactical ones, are for the judgment of counsel) to present no evidence or perhaps to withhold evidence readily available concerning this long interval, and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.

In the circumstances exhibited, the former is not equal to the feat, and the latter will not permit it. No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand.[15] To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof. Furthermore, the inference would be more plausible perhaps if the evidence of insanity as of May, 1919, were stronger than it is, such for instance as Chaplain Mathews' testimony would have furnished if it could be taken as applying to petitioner. But, on this record, the evidence of insanity as of that time is thin at best, if it can be regarded as at all more than speculative.[16]

Beyond this, there is nothing to show totality or permanence. These come only by what the Circuit Court of Appeals rightly characterized as "long-range retroactive diagnosis." That might suffice, notwithstanding this crucial inference was a matter of opinion, if there were factual evidence over which the medical eye could travel and find continuity through the intervening years. Cf. *Halliday* v. *United States*, *supra*. But eight years are too many to permit it to skip, when the bridgeheads (if the figure may be changed) at each end are no stronger than they are here, and when the seer first denies, then admits, then denies again, that what took place in this time would make "a great deal" of difference in what he saw. Expert medical inference rightly can do much. But we think the feat attempted here too large for its accomplishment.

The Circuit Court of Appeals thought petitioner's enlistments and service in the Navy and Army in 1920-1922 were in them-

[15] Compare Bishop v. Copp, 96 Conn. 571, 580; Murphree v. Senn, 107 Ala. 424; Aldrich v. Aldrich, 215 Mass. 164.

[16] Cf. Dr. Wilder's admission, note 10, *supra*.

selves "such physical facts as refute any reasonable inferences which may be drawn from the evidence here presented by him that he was *totally* and *permanently* disabled during the life of his policy." 130 F. 2d 471; cf. *Atkins* v. *United States*, 63 App. D. C. 164, 70 F. 2d 768, 771; *United States* v. *Le Duc*, 48 F. 2d 789, 793 (C. C. A.). The opinion also summarizes and apparently takes account of the evidence presented on behalf of the Government. 130 F. 2d 469, 470. In view of the ground upon which we have placed the decision, we need not consider these matters.

III.

What has been said disposes of the case as the parties have made it. For that reason perhaps nothing more need be said. But objection has been advanced that, in some manner not wholly clear, the directed verdict practice offends the Seventh Amendment.

It may be noted, first, that the Amendment has no application of its own force to this case. The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign.[17] Whatever force the Amendment has therefore is derived because Congress, in the legislation cited,[18] has made it applicable. Even so, the objection made on the score of its requirements is untenable.

If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly

[17] Neither the Amendment's terms nor its history suggest it was intended to extend to such claims. The Court of Claims has functioned for almost a century without affording jury trial in cases of this sort and without offending the requirements of the Amendment. McElrath v. United States, 102 U. S. 426; see Richardson, History, Jurisdiction and Practice of the Court of Claims (2d ed. 1885). Cf. also note 18, *infra*.

[18] 43 Stat. 1302, 38 U. S. C. § 445; see H. R. Rep. No. 1518, 68th Cong., 2d Sess., 2; Pence v. United States, 316 U. S. 332, 334; Whitney v. United States, 8 F. 2d 476 (C. C. A.); Hacker v. United States, 16 F. 2d 702 (C. C. A.).

Although Congress, in first permitting suits on War Risk Insurance policies, did not explicitly make them triable by jury, 40 Stat. 398, 410, the statute was construed to import "the usual procedure . . . in actions at law for money compensation." Law v. United States, 266 U. S. 494, 496. In amending that Act, Congress provided that, except for differences not relevant here, the "procedure in such suits shall . . . be the same as that provided for

a century.[19] More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; *Berry* v. *United States*, 312 U. S. 450. The objection therefore comes too late.

Furthermore, the argument from history is not convincing. It is not that "the rules of the common law" in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791. Then as now courts excluded evidence for irrelevancy and relevant proof for other reasons.[20] The argument concedes they weighed the evidence, not only piecemeal but *in toto* for submission to the jury, by at least two procedures, the demurrer to the evidence and the motion for a new trial. The objection is not therefore to the basic thing,[21] which is the power of the court to withhold cases from the jury or set aside the verdict for insufficiency of the evidence. It is rather to incidental or collateral effects, namely, that the directed verdict as now administered differs from both those procedures because, on the one hand, allegedly higher standards of proof are required and, on the other, different consequences follow as to further maintenance of the litigation. Apart from the standards of proof, the argument appears to urge that in 1791, a litigant could challenge his opponent's evidence, either by the demurrer, which when determined ended the litigation, or by motion for a new trial which, if successful, gave the adversary another chance to prove his case; and therefore the Amendment excluded any challenge to which one or the other of these consequences does not attach.

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then

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suits" under the Tucker Act. 43 Stat. 607, 613. Suits under the Tucker Act were tried without a jury (24 Stat. 505). However, within a year (in 1925) Congress amended that Act (43 Stat. 1302) with the intention to "give the claimant the right to a jury trial." H. R. Rep. No. 1518, 68th Cong., 2d Sess., 2.

[19] See, *e. g.*, Parks v. Ross, 11 How. 362; Improvement Co. v. Munson, 14 Wall. 442; Pleasants v. Fant, 22 Wall. 116; Commissioners of Marion County v. Clark, 94 U. S. 278; Ewing v. Goode, 78 Fed. 442 (C. C.); *cf.* Southern Ry. v. Walters, 284 U. S. 190; Gunning v. Cooley, 281 U. S. 90.

[20] Compare, *e. g.*, 3 Gilbert, The Law of Evidence (1792) 1181-5; Rex v. Paine, 5 Mod. 163; Folkes v. Chadd, 3 Doug. 157.

[21] *Cf.* Thoe v. Chicago, M. & St. P. R. R., 181 Wis. 456.

prevailing.[22] Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries.[23] In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England.[24] And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form.[25] In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.[26]

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[22] Ex parte Peterson, 253 U. S. 300; Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494; Walker v. New Mexico & Southern Pacific R. R., 165 U. S. 593; Capital Traction Co. v. Hoff, 174 U. S. 1; *cf.* Stone, J., dissenting in Dimick v. Scheidt, 293 U. S. 474, 490. The rules governing the admissibility of evidence, for example, have a real impact on the jury's function as a trier of facts and the judge's power to impinge on that function. Yet it would hardly be maintained that the broader rules of admissibility now prevalent offend the Seventh Amendment because at the time of its adoption evidence now admitted would have been excluded. *Cf. e. g.*, Funk v. United States, 290 U. S. 371.

[23] *E. g.*, during the eighteenth and nineteenth centuries, the nonsuit was being transformed in practice from a device by which a plaintiff voluntarily discontinued his action in order to try again another day into a procedure by which a defendant could put in issue the sufficiency of the plaintiff's evidence to go to the jury, differing from the directed verdict in that respect only in form. Compare Blackstone's Commentaries, Book III (Cooley's ed., 1899) 376; Johnson, J., dissenting in Elmore v. Grymes, 1 Pet. 469 (1828); Oscanyan v. Winchester Arms Co., 103 U. S. 261, 264; Coughran v. Bigelow, 164 U. S. 301; see the historical survey in the comprehensive opinion of McAllister, J., in Hopkins v. Nashville, C. & St. L. Ry., 96 Tenn. 409. See generally 2 Tidd's Practice (4th Amer. ed., 1856) 861, 866-8. The nonsuit, of course, differed in consequence from the directed verdict, for it left the plaintiff free to try again. Oscanyan v. Winchester Arms Co., *supra*; Tidd's Practice, *supra*.

Similarly the demurrer to the evidence practice was not static during this period as a comparison of Cocksedge v. Fanshaw, 1 Doug. 118 (1779), with Gibson v. Hunter, 2 H. Bl. 187 (1793), and the American practice on the demurrer to the evidence reveals [see, *e. g.*, Stephens v. White, 2 Wash. 203 (Va. 1796); Patrick v. Hallet, 1 Johns. 241 (N. Y. 1806); Whittington v. Christian, 2 Randolph 353 (Va. 1824). See, generally, Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465; Thayer, Preliminary Treatise on Evidence (1898) 234-9]. Nor was the conception of directing a verdict entirely unknown to the eighteenth century common law. See, *e. g.*, Wilkinson v. Kitchin, 1 Ld. Raymond 89 (K. B.); Syderbottom v. Smith, 1 Strange 649. While there is no reason to believe that the notion at that time even approximated in character the present directed verdict, the cases serve further to show the plastic and developing character of these procedural devices during the eighteenth and nineteenth centuries.

[24] See, *e. g.*, Quincy's Mass. Reports 553-72.

[25] See note 23, *supra*.

[26] See, *e. g.*, Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465.

This difficulty, no doubt, accounts for the amorphous character of the objection now advanced, which insists, not that any single one of the features criticized, but that the cumulative total or the alternative effect of all, was embodied in the Amendment. The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.[27]

Apart from the uncertainty and the variety of conclusion which follows from an effort at purely historical accuracy, the consequences flowing from the view asserted are sufficient to refute it. It may be doubted that the Amendment requires challenge to an opponent's case to be made without reference to the merits of one's own and at the price of all opportunity to have it considered. On the other hand, there is equal room for disbelieving it compels endless repetition of litigation and unlimited chance, by education gained at the opposing party's expense, for perfecting a case at other trials. The essential inconsistency of these alternatives would seem sufficient to refute that either or both, to the exclusion of all others, received constitutional sanctity by the Amendment's force. The first alternative, drawn from the demurrer to the evidence, attributes to the Amendment the effect of forcing one admission because another and an entirely different one is made,[28] and thereby compels conclusion of the litigation once and for all. The true effect of imposing such a risk would not be to guarantee the plaintiff a jury trial. It would be rather to deprive the defendant (or the plaintiff if he were the challenger) of that right; or, if not that, then of the right to challenge the legal sufficiency of the opposing case. The Amendment was not framed or adopted to deprive either party of either right. It is impartial in its guaranty of

[27] *Cf.* notes 22 and 23, *supra.*

[28] By conceding the full scope of an opponent's evidence and asserting its sufficiency in law, which is one thing, the challenger must be taken, perforce the Amendment, also to admit he has no case, if the other's evidence is found legally sufficient, which is quite another thing. In effect, one must stake his case, not upon its own merit on the facts, but on the chance he may be right in regarding his opponent's as wanting in probative content. If he takes the gamble and loses, he pays with his own case, regardless of its merit and without opportunity for the jury to consider it. To force this choice and yet deny that afforded by the directed verdict would be to imbed in the Constitution the hypertechnicality of common-law pleading and procedure in their heyday. *Cf.* note 22, *supra.*

both. To posit assertion of one upon sacrifice of the other would dilute and distort the full protection intended. The admitted validity of the practice on the motion for a new trial goes far to demonstrate this.[29] It negatives any idea that the challenge must be made at such a risk as the demurrer imposed. As for the other alternative, it is not urged that the Amendment guarantees another trial whenever challenge to the sufficiency of evidence is sustained. Cf. *Berry* v. *United States, supra.* That argument, in turn, is precluded by the practice on demurrer to the evidence.

Each of the classical modes of challenge, therefore, disproves the notion that the characteristic feature of the other, for effect upon continuing the litigation, became a part of the Seventh Amendment's guaranty to the exclusion of all others. That guaranty did not incorporate conflicting constitutional policies, that challenge to an opposing case must be made with the effect of terminating the litigation finally and, at the same time, with the opposite effect of requiring another trial. Alternatives so contradictory give room, not for the inference that one or the other is required, but rather for the view that neither is essential.[30]

Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises.[31] Nor is the matter greatly aided by substituting one general formula for

[29] Under that practice the moving party receives the benefit of jury evaluation of his own case and of challenge to his opponent's for insufficiency. If he loses on the challenge, the litigation is ended. But this is not because, in making it, he is forced to admit his own is insufficient. It is rather for the reasons that the court finds the opposite party's evidence is legally sufficient and the jury has found it outweighs his own. There is thus no forced surrender of one right from assertion of another.

On the other hand, if the challenger wins, there is another trial. But this is because he has sought it, not because the Amendment guarantees it.

[30] We have not given special consideration to the latest decisions touching the Amendment's effects in the different situations where a verdict has been taken, on the one hand, without reservation of the question of the sufficiency of the evidence, Slocum v. New York Life Ins. Co., 228 U. S. 364, and, on the other hand, with such a reservation, Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654. *Cf.* Aetna Ins. Co. v. Kennedy, 301 U. S. 389. Whatever may be the exact effect of the latter and, more recently, of Rule 50 of the Federal Rules of Civil Procedure upon the former decision, it suffices to say that, notwithstanding the sharp division engendered in the Slocum case, there was no disagreement in it or in the Redman case concerning the validity of the practice of directing a verdict. On the contrary, the opinions make it plain that this was unquestioned and in fact conceded by all.

[31] *Cf.* 9 Wigmore, Evidence (1940) 296-299.

another. It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence," or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence[32] or on motion for a directed verdict, cannot amount to a departure from "the rules of the common law" which the Amendment requires to be followed.[33] If there is abuse in this respect, the obvious remedy is by correction on appellate review.

Judged by this requirement, or by any standard other than sheer speculation, we are unable to conclude that one whose burden, by the nature of his claim, is to show continuing and total disability for nearly twenty years supplies the essential proof of continuity when he wholly omits to show his whereabouts, activities or condition for five years, although the record discloses evidence must have been available, and, further, throws no light upon three additional years, except for one vaguely described and dated visit to his former home. Nothing in the Seventh Amendment requires it should be allowed to join forces with the jury system to bring about such a result. That guaranty requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. It permits expert opinion to have the force of fact when based on facts which sustain it. But it does not require that experts or the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has the evidence of them in his peculiar knowledge and possession, but

[32] *Cf. e. g.* Fowle v. Alexandria, 11 Wheat. 320, 323 (1826), a demurer to the evidence admits "whatever the jury may reasonably infer from the evidence." Pawling v. United States, 4 Cranch, 219, 221-222 (1808). A demurrant to the evidence admits "the truth of the testimony to which he demurs and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, the court ought to draw." Cocksedge v. Fanshaw, *supra*; Patrick v. Hallet, *supra*; Stephens v. White, *supra*.

[33] *Cf.* Hughes, J., dissenting in Slocum v. New York Life Ins. Co., 228 U. S. 364, 408, and cases cited *supra*, note 22.

elects to keep it so. The words "total and permanent" are the statute's, not our own. They mean something more than incipient or occasional disability. We hardly need add that we give full credence to all of the testimony. But that cannot cure its inherent vagueness or supply essential elements omitted or withheld.

Accordingly, the judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 553.—October Term, 1942.

Joseph Galloway, by Freda Galloway, his Guardian, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 24, 1943.]

Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Murphy concur, dissenting.

The Seventh Amendment to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Court here re-examines testimony offered in a common law suit, weighs conflicting evidence, and holds that the litigant may never take this case to a jury. The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty.[1] For this reason, among others, they adopted Article III, § 2 of the Constitution, and the Sixth and Seventh Amendments. Today's decision marks a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.

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1 "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 Writings of Thomas Jefferson (Washington ed.) 71.

The operation of the jury trial system in civil cases has been subject to careful analysis; Clark and Shulman, Jury Trial in Civil Cases, 43 Yale L. Jour. 867; Harris, Is the Jury Vanishing, 7 N. Y. U. L. Q. 657. Its utility has been sharply criticized; Pound, Jury—England and United States, 8 Encyclopedia of the Social Sciences 492; Mr. Justice Miller, The System of Trial by Jury, 21 American L. Rev. 859 (1887). On the other hand, this Court has on occasion warmly praised this mode of trial: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." Jacob v. New York, 315 U. S. 752.

I.

Alexander Hamilton in The Federalist emphasized his loyalty to the jury system in civil cases and declared that jury verdicts should be re-examined, if at all, only "by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court." He divided the citizens of his time between those who thought that jury trial was a "valuable safeguard to liberty" and those who thought it was "the very palladium of free government." However, he felt it unnecessary to include in the Constitution a specific provision placing jury trial in civil cases in the same high position as jury trial in criminal cases.[2]

Hamilton's view, that constitutional protection of jury trial in civil cases was undesirable, did not prevail. On the contrary, in response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment.[3] The first Congress expected the Seventh Amendment to meet the objections of men like Patrick Henry to the Constitution itself. Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, "Trial by jury is the best appendage of freedom. . . . We are told that we are to part with that trial by jury with which our ancestors secured their lives and property. . . . I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. *The unanimous verdict of impartial men cannot be reversed.*"[4] The first Congress, therefore provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself. 1 Stat. 73, 81.

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[1] For Hamilton's views on the place of the jury in the Constitution, see The Federalist, Nos. 81 and 83.

[2] "One of the strongest objections taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." Parsons v. Bedford, 3 Pet. 433, 446. Of the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases. Documents Illustrative of the Formation of the Constitution, House Doc. No. 398, 69th Cong., 1st Sess., pp. 1019 (Massachusetts), 1026 (New Hampshire), 1029 (Virginia), 1036 (New York), 1046 (North Carolina), 1054 (Rhode Island).

[3] 4 Elliott's Debates, 324, 344. Emphasis added.

In 1789, juries occupied the principal place in the administration of justice. They were frequently in both criminal[5] and civil cases the arbiters not only of fact but of law. Less than three years after the ratification of the Seventh Amendment, this Court called a jury in a civil case brought under our original jurisdiction. There was no disagreement as to the facts of the case. Chief Justice Jay, charging the jury for a unanimous Court, three of whose members had sat in the Constitutional Convention, said: "For, as on the one hand, it is presumed that juries are the best judges of fact; it is on the other hand presumable that the courts are the best judges of law. But still, both objects are lawfully within your power of decision." *Georgia* v. *Brailsford*, 3 Dall. 1, 4. Similar views were held by state courts in Connecticut, Massachusetts, Illinois, Louisiana and presumably elsewhere.[6]

The principal method by which judges prevented cases from going to the jury in the Seventeenth and Eighteenth Centuries was by the demurrer to the evidence, under which the defendant at the end of the trial admitted all facts shown by the plaintiff as well as all inferences which might be drawn from the facts, and asked for a ruling of the Court on the "law of the case."[7] See for example *Wright* v. *Pindar*, (1647) Alleyn 18 and *Pawling* v. *United States*, 4 Cranch 219. This practice fell into disuse in England in 1793, *Gibson* v. *Hunter*, 2 H. Bl. 187, and in the United States federal courts in 1826, *Fowle* v. *Alexandria*, 11 Wheat. 320. The power of federal judges to comment to the jury on the evidence gave them additional influence. *M'Lanahan* v. *Universal Insurance Co.*, 1 Pet. 170 (1828). The right of in-

[5] The early practice under which juries were empowered to determine issues of law in criminal cases was not formally rejected by this Court until 1894 in Sparf and Hansen v. United States, 156 U. S. 51, when the subject was exhaustively discussed. See also Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582. This jury privilege was once considered of high value; in fact, a principal count in the impeachment proceedings against Justice Chase in 1805 was that he had denied to a jury the right to determine both the law and the fact in a criminal case—a charge which Justice Chase denied. Report of Trial of Hon. Samuel Chase (1805), appendix p. 17. This privilege is still at least nominally retained for the jury in some states. Howe, 614. For a late 19th Century statement of this view see Kane v. Commonwealth, 89 Pa. St. 522 (1879).

[6] See Howe, *supra*, pp. 597, 601, 605, 610; Coffin v. Coffin, 4 Mass. 1, 25; Thayer on Evidence (1898 ed.) 234. And see Lectures given by Justice Wilson as Professor of Law at the College of Philadelphia in 1790 and 1792, Thayer, 254, and Sparf and Hansen v. United States, *supra*, at 158.

[7] I assume for the purpose of this discussion without deciding the point that the adoption of the Seventh Amendment was meant to have no limiting effect on the contemporary demurrer to evidence practice.

voluntary non-suit of a plaintiff, which might have been used to expand judicial power at jury expense was at first denied federal courts. *Elmore* v. *Grymes*, 1 Pet. 469; *DeWolf* v. *Rabaud*, 1 Pet. 476; but cf. *Coughran* v. *Bigelow*, 164 U. S. 301 (1896).

As Hamilton had declared in The Federalist, the basic judicial control of the jury function was in the court's power to order a new trial.[8] In 1830, this Court said: "The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings." *Parsons* v. *Bedford*, *supra*, at 448.[9] That retrial by a new jury rather than factual reevaluation by a court is a constitutional right of genuine value was restated as recently as *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364.[10]

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[8] A method used in early England of reversal of a jury verdict by the process of attaint which required a review of the facts by a new jury of twenty-four and resulted in punishment of the first jury for its error, had disappeared. Plucknett, A Concise History of the Common Law (2d ed.), 121.

[9] It is difficult to describe by any general proposition the circumstances under which a new trial would be allowed under early practice, since each case was so dependent on its peculiar facts. The early Pennsylvania rule was put as follows: "New trials are frequently necessary, for the purpose of attaining complete justice; but the important right of trial by jury requires they should never be granted without solid and substantial reasons; otherwise the province of jurymen might be often transferred to the judges, and they instead of the jury, would become the real triers of facts. A reasonable doubt, barely, that justice has not been done, especially in cases where the value or importance of the cause is not great, appears to me to be too slender a ground for them. But, whenever it appears with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law, or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages; the Court will always give an opportunity, by a new trial, of rectifying the mistake of the former jury, and of doing complete justice to the parties." Cowperthwaite v. Jones, 4 Dall. 55 (Phila. Ct. Com. Pleas 1790). For expressions in substantial accord see Maryland Insurance Co. v. Ruden's Administrator, 6 Cranch 338, 340; M'Lanahan v. Universal Insurance Co., 1 Pet. 170, 183. For similar State practice see Utica Insurance Co. v. Badger, 3 Wend. 102 (1829); New York Firemen Insurance Co. v. Walden, 12 Johns. 513 (1815). The motion for new trial was addressed to the discretion of the trial judge and was not reviewable in criminal or civil cases. United States v. Daniel, 6 Wheat. 542, 548; Brown v. Clarke, 4 How. 4, 15. The number of new trials permitted in a given case were usually limited to two or three; see e. g. Louisville and N. R. R. v. Woodson, 134 U. S. 614. The power of the judge was thus limited to his authority to return the case to a new jury for a new decision.

[10] Cf. Baltimore and Carolina Line v. Redmond, 295 U. S. 654; Aetna Insurance Co. v. Kennedy, 301 U. S. 389. See Rule 50(b) of the Rules of Civil Procedure; Montgomery Ward v. Duncan, 311 U. S. 243; Berry v. United States, 312 U. S. 450.

A long step toward the determination of fact by judges instead of by juries was the invention of the directed verdict.[11] In 1850, what seems to have been the first directed verdict case considered by this Court, *Parks* v. *Ross*, 11 How. 362, was presented for decision. The Court held that the directed verdict serves the same purpose as the demurrer to the evidence, and that since there was "no evidence whatever"[13] on the critical issue in the case, the directed verdict was approved.[14] The decision was an innovation, a departure from the traditional rule restated only fifteen years before in *Greenleaf* v. *Birch*, 9 Pet. 292, 299 (1835) in which this Court had said: "Where there is no evidence tending to prove a particular fact, the courts are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have."

This new device contained potentialities for judicial control of the jury which had not existed in the demurrer to the evidence. In the first place, demurring to the evidence was risky business, for in so doing the party not only admitted the truth of all the testimony against him but also all reasonable inferences which might be drawn from it; and upon joinder in demurrer the case was withdrawn from the jury while the court proceeded to give final judgment either for or against the demur-

[11] I do not mean to minimize other forms of judicial control. In a summary of important techniques of judicial domination of the jury, Thayer lists the following: control by the requirement of a "reasonable judgment"—i. e., one satisfactory to the judge; control of the rules of "presumption", cf. the dissenting opinion in New York Life Insurance Co. *v.* Gamer, 303 U. S. 161, 172; the control of the "definition of language"; the control of rules of practice, and forms of pleading ("It is remarkable how judges and legislatures in this country are unconsciously travelling back towards the old result of controlling the jury, by requiring special verdicts and answers to specific questions. Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts. . . . Considerations of policy have called louder for leaving to the jury a freer hand." 218); the control of "mixed questions of law and fact"; the control of factual decisions by appellate courts. Thayer on Evidence (1898 ed.) p. 208 *et seq.*

[12] Counsel seeking the directed verdict said: "This prerogative of the court is never exercised, but in cases where the evidence is so indefinite and unsatisfactory, that nothing but wild, irrational conjecture, or licentious speculation, could induce the jury to pronounce the verdict which is sought at their hands." Parks *v.* Ross, *supra*, at 372.

[14] See also, Pleasants *v.* Fant, 22 Wall. 116 (1874) Oscanyan *v.* Arms Co. 103 U. S. 261 (1880); and Baylis *v.* Travellers Insurance Co., 113 U. S. 316 (1884). For an excellent discussion of the history of the directed verdict see Hackett, Has a Trial Judge of a United States Court the Right to Direct a Verdict?, 24 Yale L. Jour. 127.

rant. *Hopkins* v. *Nashville, C. & St. L. Ry.*, 96 Tenn. 409; *Suydam* v. *Williamson*, 20 How. 427, 436; *Bass* v. *Rublee*, 76 Vt. 395, 400. Imposition of this risk was no mere technicality; for by making withdrawal of a case from the jury dangerous to the moving litigant's cause, the early law went far to assure that facts would never be examined except by a jury. Under the directed verdict practice the moving party takes no such chance, for if his motion is denied, instead of suffering a directed verdict against him, his case merely continues into the hands of the jury. The litigant not only takes no risk by a motion for a directed verdict, but in making such a motion gives himself two opportunities to avoid the jury's decision; for under the federal variant of judgment not withstanding the verdict, the judge may reserve opinion on the motion for a directed verdict and then give judgment for the moving party after the jury was formally found against him.[14] In the second place, under the directed verdict practice the courts soon abandoned the "admission of all facts and reasonable inferences" standard referred to, and created the so-called "substantial evidence" rule which permitted directed verdicts even though there was far more evidence in the case than a plaintiff would have needed to withstand a demurrer.

The substantial evidence rule did not spring into existence immediately upon the adoption of the directed verdict device. For a few more years[15] federal judges held to the traditional rule that juries might pass finally on facts if there was "any evidence" to support a party's contention. The rule that a case must go to the jury unless there was "no evidence" was completely repudiated in *Improvement* v. *Munson*, 14 Wall. 442, 447 (1871), upon which the Court today relies in part. There the Court declared that "some" evidence was not enough—there must be evidence sufficiently persuasive to the judge so that he thinks "a jury can properly proceed." The traditional rule was given an ugly name, "the scintilla rule", to hasten its demise. For a time traces of the old formula remained, as in *Randall* v. *B. & O. Railroad*, 109 U. S. 478, but the new spirit prevailed. See for example, *Pleasants* v.

[14] Rule 50(b) of the Rules of Civil Procedure and note 10, *supra*.

[15] In the period of the Civil War, the formula changed slightly but its effect was the same—if the evidence so much as "tended to prove the position" of the party, the case was for the jury. Drakely v. Gregg, 8 Wall. 42, 268; Hickman v. Jones, 9 Wall. 197, 201; Barney v. Schmeider, 9 Wall. 248, 253. Cf. United States v. Breitling, 20 How. 252; Goodman v. Simonds, 20 How. 343, 359.

Fant, supra, and *Commissioners* v. *Clark*, 4 Otto 278. The same transition from jury supremacy to jury subordination through judicial decisions took place in State courts.[16]

Later cases permitted the development of added judicial control.[17] New and totally unwarranted formulas, which should surely be eradicated from the law at the first opportunity, were added as recently as 1929 in *Gunning* v. *Cooley*, 281 U. S. 90, which, by sheerest dictum, made new encroachments on the jury's constitutional functions. There it was announced that a judge might weigh the evidence to determine whether he, and not the jury, thought it was "overwhelming" for either party, and then direct a verdict. Cf. *Pence* v. *United States*, 316 U. S. 332, 340. *Gunning* v. *Cooley*, at 94, also suggests quite unnecessarily for its decision, that "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither." This dictum, which assumes that a judge can weigh conflicting evidence with mathematical precision and which wholly deprives the jury of the right to resolve that conflict, was applied in *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333. With it, and other tools, jury verdicts on disputed facts have been set aside or directed verdicts authorized so regularly as to make the practice commonplace while the motion for directed verdict itself has become routine. See for example *Southern Railway Co.* v. *Walters*, 284 U. S. 190; *Atlantic Coast Line Railroad* v. *Temple*, 285 U. S. 143; *Lumbra* v. *United States*, 290 U. S. 551; *Pence* v. *United States, supra*; and *De Zon* v. *United States*, — U. S. —.

Even *Gunning* v. *Cooley*, at 94, acknowledged that "issues that depend on the credibility of witnesses . . . are to be decided by the jury."[18] Today the Court comes dangerously close to weighing the credibility of a witness and rejecting his testimony because the majority do not believe it.

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[16] For examples of early respect for juries, see Morton v. Fairbanks, 11 Pick. 368 (1831); Way v. Illinois Central Railway, 25 Iowa 585 (1873). For the development in Illinois, see 8 Ill. L. Rev. 287, 481-486. For the Pennsylvania development, compare Fitzwater v. Stout, 16 Pa. St. 22, and Thomas v. Thomas, 21 Pa. St. 315, with Hyatt v. Johnson, 91 Pa. St. 196, 200.

[17] One additional device was the remittitur practice which gives the court a method of controlling jury findings as to damages. Arkansas Valley Co. v. Mann, 130 U. S. 69.

[18] In Ewing v. Burnett, 11 Pet. 41, 51, this Court said: "It was also [the jury's] province to judge of the credibility of the witnesses, and the

The story thus briefly told depicts the constriction of a constitutional civil right and should not be continued. Speaking of an aspect of this problem, a contemporary writer saw the heart of the issue: "Such a reversal of opinion [as that of a particular State court concerning the jury function], if it were isolated, might have little significance, but when many other courts throughout the country are found to be making the same shift and to be doing so despite the provisions of statutes and constitutions there is revealed one aspect of that basic conflict in the legal history of America—the conflict between the people's aspiration for democratic government,[19] and the judiciary's desire for the orderly supervision of public affairs by judges."[20]

The language of the Seventh Amendment cannot easily be improved by formulas.[21] The statement of a district judge in *Tarter* v. *United States*, 17 F. Supp. 691, 693, represents, in my opinion, the minimum meaning of the Seventh Amendment:

"The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of a plaintiff in an action. If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the

weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere, the plaintiff's right to the instruction asked, must depend upon the opinion of the court, on a finding by the jury in favour of the defendant, on every matter which the evidence conduced to prove; giving full credence to the witnesses produced by him, and discrediting the witness for the plaintiff".

[19] Another phase of this same conflict arises in the use of judicial power to punish for contempt of court without allowance of jury trial. Nelles and King, Contempt by Publication, 28 Col. L. Rev. 400, 524, and, for a sharp indictment of the free use of contempt jurisdiction as basically undemocratic, 553; Nye v. United States, 313 U. S. 33; Bridges v. California, 314 U. S. 252.

[20] Howe, *supra*, 615, 616. Howe continues: "What seems discreditable to the judiciary in the story which I have related is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions. It is possible to feel that the final solution of the problem has been wise without approving the frequently arrogant methods which courts have used in reaching that result."

[21] This Court has said of one type of case in Richmond and D. R. R. v. Powers, 149 U. S. 43, 45 (1893): "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials."

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that Constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right." So few of these cases come to this Court that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeal are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances.

II.

The factual issue for determination here is whether the petitioner incurred a total and permanent disability not later than May 31, 1919. It is undisputed that the petitioner's health was sound in 1918, and it is evidently conceded that he was disabled at least since 1930. When in the intervening period, did the disability take place?

A doctor who testified diagnosed the petitioner's case as a schizophrenic form of dementia praecox. He declared it to be sound medical theory that while a normal man can retain his sanity in the face of severe mental or physical shock, some persons are born with an inherent instability so that they are mentally unable to stand sudden and severe strain. The medical testimony

was that this petitioner belongs to the latter class and that the shock of actual conflict on the battle front brought on the incurable affliction from which he now suffers. The medical witness testified that the dominant symptoms of the condition are extreme introversion and preoccupation with personal interests, a persecution complex, and an emotional instability which may be manifested by extreme exhilaration alternating with unusual depression or irrational outbursts. Persons suffering from this disease are therefore unable to engage in continuous employment.

The petitioner relies on the testimony of wartime and post war companions and superiors to show that his present mental condition existed on the crucial date. There is substantial testimony from which reasonable men might conclude that the petitioner was insane from the date claimed.

Two witnesses testify as to the petitioner's mental irresponsibility while he was in France. The most striking incident in this testimony is the account of his complete breakdown while on guard duty as a result of which he falsely alarmed his military unit by screaming that the Germans were coming when they were not and was silenced only by being forceably bound and gagged. There was also other evidence that Galloway became nervous, irritable, quarrelsome and turbulent after he got to France. The Court disposes of this testimony, which obviously indicates some degree of mental unbalance, by saying no more than that it "does not prove he was insane." No reason is given, nor can I imagine any, why a jury should not be entitled to consider this evidence and draw its own conclusions.

The testimony of another witness, O'Neill, was offered to show that the witness had known the petitioner both before and after the war, and that after the war the witness found the petitioner a changed man; that the petitioner imagined that he was being persecuted; and that the petitioner suffered from fits of melancholia, depression and weeping. If O'Neill's testimony is to be believed the petitioner suffered the typical symptoms of a schizophreniac for some years after his return to this country; therefore if O'Neill's testimony is believed, there can be no reasonable doubt about the right of a jury to pass on this case. The Court analyzes O'Neill's testimony for internal consistency, criticizes his failure to remember the details of his association with the petitioner fifteen years before his appearance in this case, and concludes that O'Neill's evidence shows no more than that "petitioner

was subject to alternating periods of gaiety and depression for some indefinite period." This extreme emotional instability is an accepted symptom of the disease from which the petitioner suffers. If he exhibited the same symptoms in 1922, it is, at the minimum, probable that the condition has been continuous since an origin during the war. O'Neill's testimony coupled with the petitioner's present condition presents precisely the type of question which a jury should resolve.

The petitioner was in the Navy for six months in 1920, until he was discharged for bad conduct, and later was in the Army during 1921 and a part of 1922 until he deserted. The testimony of his Commanding Officer while he was in the Army, Col. Matthews, is that the petitioner had "periods of gaiety and exhilaration" and was then "depressed as if he had had a hangover"; that petitioner tried to create disturbances and dissatisfy the men; that he suffered from a belief that he was being treated unfairly; and that generally his actions "were not those of a normal man". The Colonel was not a doctor and might well not have recognized insanity had he seen it; as it was, he concluded that the petitioner was an alcoholic and a narcotic addict. However, the officer was unable, upon repeated investigations, to discover any actual use of narcotics. A jury fitting this information into the general pattern of the testimony might well have been driven to the conclusion that the petitioner was insane at the time the Colonel had him under observation.

All of this evidence, if believed, showed a man healthy and normal before he went to the war suffering for several years after he came back from a disease which had the symptoms attributed to schizophrenia and who was insane from 1930 until his trial. Under these circumstances, I think that the physician's testimony of total and permanent disability by reason of continuous insanity from 1918 to 1938 was reasonable. The fact that there was no direct testimony for a period of five years, while it might be the basis of fair argument to the jury by the government, does not, as the Court seems to believe, create a presumption against the petitioner so strong that his case must be excluded from the jury entirely. Even if during these five years the petitioner was spasmodically employed, we could not conclude that he was not totally and permanently disabled. *Berry* v. *United States*, 312 U. S. 450, 455. It is not doubted that schizophrenia is permanent even though there may be a momentary appearance of recovery.

The court below concluded that the petitioner's admission into the military service between 1920 and 1923 showed conclusively that he was not totally and permanently disabled. Any inference which may be created by the petitioner's admission into the Army and the Navy is more than met by his record of court martial, dishonorable discharge, and desertion, as well as by the explicit testimony of his Commanding Officer, Colonel Matthews.

This case graphically illustrates the injustice resulting from permitting judges to direct verdicts instead of requiring them to await a jury decision and then, if necessary, allow a new trial. The chief reason given for approving a directed verdict against this petitioner is that no evidence except expert medical testimony was offered for a five to eight year period. Perhaps, now that the petitioner knows he has insufficient evidence to satisfy a judge even though he may have enough to satisfy a jury, he would be able to fill this time gap to meet any judge's demand. If a court would point out on a motion for new trial that the evidence as to this particular period was too weak, the petitioner would be given an opportunity to buttress the physician's evidence. If, as the Court believes, insufficient evidence has been offered to sustain a jury verdict for the petitioner, we should at least authorize a new trial. Cf. *Garrison* v. *United States*, 62 F. 2d 41, 42.

I believe that there is a reasonable difference of opinion as to whether the petitioner was totally and permanently disabled by reason of insanity on May 31, 1919, and that his case therefore should have been allowed to go to the jury. The testimony of fellow soldiers, friends, supervisors, and of a medical expert whose integrity and ability is not challenged cannot be rejected by any process available to me as a judge.